

1-1-1996

"Other Accident" Evidence in Product Liability Actions: Highly Probative or an Accident Waiting to Happen?

Robert A. Sachs

Follow this and additional works at: <https://digitalcommons.law.ou.edu/olr>



Part of the [Evidence Commons](#), and the [Torts Commons](#)

Recommended Citation

Robert A. Sachs, *"Other Accident" Evidence in Product Liability Actions: Highly Probative or an Accident Waiting to Happen?*, 49 OKLA. L. REV. 257 (1996),
<https://digitalcommons.law.ou.edu/olr/vol49/iss2/3>

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

"OTHER ACCIDENT" EVIDENCE IN PRODUCT LIABILITY ACTIONS: HIGHLY PROBATIVE OR AN ACCIDENT WAITING TO HAPPEN?

ROBERT A. SACHS*

Table of Contents

| | |
|---|-----|
| I. Introduction | 257 |
| II. Evidentiary Foundational Requirements | 258 |
| A. Relevance | 258 |
| B. Hearsay | 260 |
| C. Requirement of Similarity | 262 |
| D. Unfair Prejudice, Confusion of Issues, Misleading the Jury, Undue Delay, Waste of Time, or Cumulative Evidence | 266 |
| III. Reasons Advanced for the Admissibility of "Other Accident" Evidence | 270 |
| A. Proving the Existence of a Condition or Defect | 270 |
| B. Proving Causation | 272 |
| C. Proving the Extent of the Risk Created | 275 |
| D. Proving that the Defendant Knew or Should Have Known of the Dangers of the Product | 278 |
| E. Proving that the Manufacturer Knew of the Use to Which the Product Was Put at the Time of the Accident | 280 |
| F. Serving as a Basis for the Testimony of Plaintiff's Expert | 281 |
| G. Affecting the Credibility of a Defense Expert | 287 |
| H. Serving as a Basis of a Claim for Punitive Damages | 290 |
| IV. Conclusion | 293 |

I. Introduction

A critical issue in the trial of many product liability actions is whether a jury will hear evidence of other accidents¹ involving the same or a similar product. Many arguments have been advanced as to why this evidence is relevant and admissible, and as many arguments have been advanced why this evidence is not relevant and should not be admitted. In every product liability case where "other accident"

* B.A. 1965, Williams College; J.D. 1968, University of Virginia. Member of the firm of Monte, Marriott & Sachs, Sea Girt, New Jersey. The author thanks Professor Ronald L. Carlson for reviewing the manuscript and providing helpful comments.

1. Unless otherwise stated, the term "accident," as used in this article, is intended to refer to a discreet event causing immediate injury or damage, and to exclude exposure to chemicals or other substances over time. In long-term exposure cases, epidemiological studies, or other considerations beyond the scope of this article may apply.

evidence arises, the ruling of the court on this issue has the potential to affect significantly the outcome of the case.² Courts in various jurisdictions, however, have reached different results. The purpose of this article is to consider whether other accident evidence should be admissible in a product liability action and, if so, under what circumstances it should be admissible.

Arguments advanced — and sometimes accepted by courts — as to why evidence of other accidents should be admissible in a product liability action include claims that such evidence is needed for the following purposes: (1) to prove the existence of a condition or defect; (2) to prove causation; (3) to show the extent of the risk created; (4) to show the manufacturer's notice or knowledge of the dangers of the product; (5) to show the manufacturer's knowledge of the foreseeability of the use to which the product was put at the time of the accident in question; (6) to serve as a basis for the testimony of plaintiff's expert; (7) to affect the credibility of a defense expert; and (8) to form the basis of a claim for punitive damages.³ Before evaluating the validity of these arguments, however, it is important to consider certain evidentiary foundational requirements.

II. Evidentiary Foundational Requirements

A. Relevance

Under Federal Rule of Evidence 402 (and similar state rules), "[e]vidence which is not relevant is not admissible."⁴ "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."⁵

If there is no dispute as to a particular issue or fact, "other accident" evidence presented as proof of that issue or fact is not relevant because it does not make the existence of the issue or fact either "more probable or less probable than it would be without the evidence." If the evidence is not relevant, it should not be admissible. In *Rye v. Black & Decker Manufacturing Co.*,⁶ for instance, the

2. The authors of an article suggesting the manner in which attorneys should argue for the admissibility of "other accident" evidence speak of the "potentially pivotal probative value of such evidence." Francis H. Hare, Jr. & Mitchell K. Shelly, *The Admissibility of Other Similar Incident Evidence: A Three Step Approach*, 15 AM. J. TRIAL ADVOC. 541, 542 (1992). Elsewhere, another author mentions "the impact previous incident evidence may have on a jury" and asserts that "evidence of other accidents involving the same product can be highly beneficial to its proponent." Anthony Frazier, Note, *The Admissibility of Similar Incidents in Product Liability Actions*, 53 MO. L. REV. 547, 547-48 (1988). *McCormick on Evidence* refers to "the prejudice that such evidence can carry with it" and points out that as a result, most judges will scrutinize this evidence carefully. 1 JOHN W. STRONG, *MCCORMICK ON EVIDENCE* § 200 (4th ed. 1992).

3. For categories 1 through 4, see 1 STRONG, *supra* note 2, § 200, and cases cited *infra* Parts III.A-D. For categories 5 through 8, see cases cited *infra* Parts III.E-H. See also 1 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 401[10], at 401-65 to -70 (1995).

4. FED. R. EVID. 402.

5. FED. R. EVID. 401.

6. 889 F.2d 100 (6th Cir. 1989).

plaintiff sought to introduce evidence of other accidents to show, among other things, that Black & Decker should have been on notice that its circular saws could bind in the wood and kick back. The defendant admitted awareness of this potential, however. Because this was not a controverted issue, the court found that "appellant was not harmed by the [trial] court's refusal to allow in the prior incidents as evidence that appellee had notice that its saws could kick back."⁷

Proof of other accidents is, at most, circumstantial evidence of the proposition which is sought to be proven. "Direct evidence" has been defined as "evidence which, if believed, resolves a matter in issue," and "circumstantial evidence" has been defined as evidence where, "even if the circumstances depicted are accepted as true, additional reasoning is required to reach the proposition to which it is directed."⁸ *McCormick on Evidence* notes that "circumstantial evidence . . . can be offered to help prove a material fact, yet be so unrevealing as to be irrelevant to that fact."⁹ In many instances, the dissimilar nature of "other claims" or "other accidents" places such evidence in the "unrevealing" category. As one court has pointed out, "As the circumstances and conditions of the other accidents become less similar to the accident under consideration, the probative force of such evidence decreases."¹⁰

Another concern which militates against the relevance of "other accident" evidence is the occasional lack of a factual basis for such evidence. Assuming that a plaintiff seeks to introduce evidence that other claims have been made of the same type of accident, that evidence is not necessarily proof that the accidents, in fact, occurred as alleged. For example, it is difficult to conceive of a more common claim than one made by a driver whose vehicle strikes another vehicle in the rear that "my brakes failed." Even if someone were to compile police reports throughout the country involving particular models of automobiles, or to produce transcripts of testimony under oath from the drivers in municipal court, this would not be probative of either a design or manufacturing defect in the vehicles.¹¹ Permitting evidence that other *claims* of accidents have occurred, however, implies — without proof — that these claims have a basis in truth.

7. *Id.* at 103.

8. 1 STRONG, *supra* note 2, § 185.

9. *Id.*

10. *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1269 (7th Cir. 1988). *See also infra* Part II.C.

11. Similarly, this author has found that in litigation relating to chain saw injuries, an overwhelming percentage of the claims have involved an allegation that there was a rotational kickback of the chain saw and that if only one or another device to reduce or eliminate the risk of harm from rotational kickback had been present, the accident or injury would not have occurred. (Rotational kickback is defined as "the rapid upward and backward motion of the saw that can occur when the moving saw chain near the upper portion of the tip of the guide bar contacts an object such as a log or branch." AMERICAN NAT'L STANDARDS INST. standard ANSI B175.1-1991, *Gasoline-Powered Chain Saws - Safety Requirements*, § 3.16.2 (1991).) These claims and sworn testimony in support of them, however, involve a number of instances where the facts of the particular accident make rotational kickback physically impossible. One requirement for rotational kickback is tip contact. Nevertheless, some plaintiffs have insisted that rotational kickback occurred, even while also insisting that there was no tip contact.

Allowing a jury to hear evidence that other accidents occurred in a certain manner when they did not occur in that manner would be highly misleading. In *Yellow Bayou Plantation, Inc. v. Shell Chemical, Inc.*¹² (a claim against the manufacturer and distributor of an herbicide which allegedly failed to control various pest-grasses in plaintiff's field), for instance, plaintiff attempted to use a list of lawsuits and complaints to Shell about the herbicide as proof that Shell knew of the ineffectiveness of the herbicide. As the court stated, "[t]he most that these items could have indicated was that absent third parties had made this claim to or against Shell from time to time. To exclude evidence of such faint probative value and high potential for unfair prejudice was well within the trial court's discretion."¹³

B. Hearsay

"Hearsay" is defined in Federal Rule of Evidence 801 as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Established hearsay principles render inadmissible various categories of evidence viewed as emanating from untrustworthy sources. These principles have a direct impact upon the admissibility of "other accident" evidence.

When a plaintiff seeks to introduce evidence of other accidents, rarely is there an attempt to produce testimony from individuals with personal knowledge of the accidents sought to be admitted. Pleadings and documents from other cases, however, when offered as proof of other accidents, clearly constitute hearsay. They also frequently originate from a biased source, such as a plaintiff seeking damages or that plaintiff's attorney. Similarly, records of claims provided by a defendant during discovery and offered into evidence by the plaintiff also constitute hearsay and often arise from the same biased sources.

The fact that an injured person is making a claim against a manufacturer and has a financial interest in the outcome of the litigation raises serious questions of the reliability of the information provided by that person. These questions of reliability intensify when accidents are not witnessed by anyone except the person making the claim. However, it is frequently information provided by other litigants or claimants from unwitnessed accidents that forms the basis of the "other accident" evidence sought to be admitted in the pending litigation.¹⁴

Many courts have recognized that serious problems of reliability exist as to information furnished by those with a stake in the outcome of a claim. In *McKinnon v. Skil Corp.*,¹⁵ for instance, the court held that "other accident" evidence from Consumer Product Safety Commission reports was properly excluded by the trial judge as untrustworthy hearsay, in part because "[m]ost of the data contained

12. 491 F.2d 1239 (5th Cir. 1974).

13. *Id.* at 1243.

14. Even where another accident *has* been witnessed by someone other than the injured party, the witness is often a friend or coworker of the injured party, and not an unbiased observer. See *infra* note 70 and accompanying text.

15. 638 F.2d 270 (1st Cir. 1981) (circular saw accident).

in the reports is simply a paraphrasing of versions of the accidents given by the victims themselves who surely cannot be regarded as disinterested observers."¹⁶ In *Soden v. Freightliner Corp.*,¹⁷ reference was made to the fact that "complaints are unsworn hearsay allegations of persons seeking to recover money damages from the defendant."¹⁸ In *Cramer v. Kuhns*,¹⁹ the court stated that owner surveys mentioned in a study by the National Highway Traffic Safety Administration (NHTSA) "are rank hearsay" and inadmissible.²⁰ In *Faries v. Atlas Truck Body Manufacturing Co.*,²¹ it was held to be error to allow an investigating patrolman to express the opinion that a motorcyclist drove at an excessive speed when he lost control of his motorcycle, where the opinion was based in part on statements of the driver of the second vehicle involved in the collision.²² And in *In re "Agent Orange" Product Liability Litigation*,²³ the court rejected expert opinion testimony as to the cause of the medical condition of "Agent Orange" claimants based in part on specific anecdotal written information supplied by the plaintiffs.²⁴ As Chief Judge Weinstein stated in his opinion, "the court takes judicial notice — based on hundreds of trials — that no reputable physician relies on hearsay checklists by litigants to reach a conclusion with respect to the cause of their afflictions."²⁵

In *Wolf v. Procter & Gamble Co.*,²⁶ it was alleged that plaintiff Stacy Wolf contracted toxic shock syndrome (TSS) as a result of the use of Rely tampons manufactured and distributed by the defendants. Plaintiffs claimed that evidence of

16. *Id.* at 278. The dissenting opinion in *Oberg v. Honda Motor Co.*, 851 P.2d 1084 (Or. 1993), *rev'd*, 512 U.S. 415 (1994), points out that information received from the CPSC, obtained from hospitals, is "double hearsay," or "hearsay within hearsay," since "some person told a care-giver about the accident, and the care-giver reported to CPSC." *Oberg*, 851 P.2d at 1103 n.2 (Peterson, J., dissenting). There is a further discussion of the CPSC procedure *infra* note 181. See also *Kontz v. K-Mart Corp.*, 712 F.2d 1302, 1304 (8th Cir. 1983) (involving a collapse of a folding vinyl lounge chair, where the court upheld the discretion of the trial judge in excluding the results of a Consumer Product Safety Commission study purportedly revealing approximately 8000 injuries per year from folding or beach chairs, "especially in the absence of proof of similarity of circumstances").

17. 714 F.2d 498 (5th Cir. 1983) (claim against truck manufacturer for post-collision fuel fire).

18. *Id.* at 507 n.12.

19. 650 N.Y.S.2d 128 (N.Y. App. Div. 1995), *motion for leave to appeal dismissed without opinion*, 662 N.E.2d 793 (N.Y. 1995) (claim against motorcycle manufacturer and driver alleging, in part, a design defect in the motorcycle side stand).

20. *Id.* at 131 (holding admission of the NHTSA study to be reversible error due to the hearsay it contained and for other reasons, including the lack of information which would permit a showing of substantial similarity between the subject accident and the ones mentioned in the study).

21. 797 F.2d 619 (8th Cir. 1986) (product liability action by a motorcyclist against the manufacturers of his motorcycle and of the truck with which he collided).

22. *Id.* at 623-24; see also *Dallas & Mavis Forwarding Co. v. Stegall*, 659 F.2d 721 (6th Cir. 1981) (a non-product liability motor vehicle accident case). In *Stegall*, one of the plaintiff's claims, that a trooper's opinion of the point of impact between two vehicles should be admissible as expert testimony under Rule 703 of the *Federal Rules of Evidence*, was rejected because the opinion "was derived primarily from the story of a biased eyewitness," an employee of the plaintiff. *Stegall*, 659 F.2d at 722.

23. 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987).

24. *Id.* at 1243-47.

25. *Id.* at 1246.

26. 555 F. Supp. 613 (D.N.J. 1982).

other injuries and deaths from TSS of users of Rely was relevant as to the issue of the unreasonableness of the danger of this product and also as to the issue of proximate cause. Defendants moved, in limine, to exclude evidence of occurrences of TSS other than that to plaintiff Stacy Wolf, and plaintiffs opposed this motion. In granting the motion, the court stated as follows:

The evidence of consumer complaints consists of complaints made over the telephone and incorporated into a written record by employees of Procter & Gamble and complaints contained in letters to the company. Even if the records made by Procter & Gamble employees are admissible as records of a regularly conducted activity pursuant to Fed.R.Evid. 806(6),²⁷ the hearsay statements that they contain must also be admissible under an exception to the hearsay rule. Fed.R.Evid. 805. However, neither these statements nor the statements in the letters of complaint are admissible under any of the hearsay rule exceptions.²⁸

C. Requirement of Similarity

The rule generally followed is that a party seeking to introduce evidence of other accidents must show that the other accidents are substantially similar to the accident at issue. It has been stated that the extent of similarity which is needed generally depends upon what the other accidents are designed to prove.²⁹ If the evidence is intended to show dangerousness, "a high degree of similarity will be essential,"³⁰ and if intended to show notice, "a lack of exact similarity of conditions will not cause exclusion provided the accident was of a kind which should have served to warn the defendant."³¹ Similarity is closely related to relevance, since unless another accident is similar to the one in question, it cannot be relevant to it.³² The issue of what constitutes similarity, however, involves two questions. First, is the same or a substantially similar product involved? And second, is there a similarity of circumstances of the accident?

If different products, or even different models of the same product, are involved in other accidents, those other accidents may have little or no relevance to the claim in issue, even if the other models are produced by the same manufacturer. Different models frequently have different characteristics, and these differences may affect the occurrence or causation of an accident. For example, a different model of a

27. Presumably, the court meant Rule 803(6), the business record exception to the hearsay rule.

28. *Wolf*, 555 F. Supp. at 620.

29. 1 WEINSTEIN & BERGER, *supra* note 3, ¶ 401[10], at 401-67 to -68.

30. *Id.* ¶ 401[10], at 401-67.

31. *Id.* ¶ 401[10], at 401-68; see also Ferdinand S. Tinio, Annotation, *Products Liability: Admissibility of Evidence of Other Accidents to Prove Hazardous Nature of Product*, 42 A.L.R.3d 780 (1972 & Supp. 1995). See discussion *infra* Part III.D.

32. Weinstein and Berger state that "when dealing with evidence of similar accidents or incidents, the greater the degree of similarity and proximity between the similar accident and the accident at bar, the greater the probative value of the evidence." 1 WEINSTEIN & BERGER, *supra* note 3, ¶ 401[10], at 401-69. A lesser degree of similarity would either reduce or eliminate any relevance.

pneumatic nailer (sometimes called a "nail gun") may have a different size trigger, different balance, or other different parts which could affect an inadvertent discharge of a nail.³³ Likewise, different models of any product (or later variations of the same model) may contain different on-product warnings; a later version may have the warnings affixed in a more permanent manner; or there may be different warnings contained in the manuals. These differences also can affect the likelihood of an accident occurring.³⁴ Moreover, a comparison of other claims may reveal that experts in those matters made criticisms of designs or warnings which were changed before the accident in the later claim. In such circumstances, if any merit existed in the criticisms in the prior matters, the fact that a change has occurred seriously compromises any allegation that the prior claims are similar and should be admitted into evidence.

In *Drabik v. Stanley-Bostitch, Inc.*,³⁵ plaintiff's head bumped into the nose of a pneumatic nailer which was being used by a coworker, causing the discharge of a nail and resultant brain injuries. The design of the nailer was such that two devices had to be engaged in order for a nail to be discharged; a work contact element at the nose of the nailer called a "contact trip" had to be pressed against a surface, and the trigger had to be depressed.³⁶ Plaintiff sought to introduce evidence of other accidents and was largely permitted to do so by the trial judge, who also permitted cross-examination of the defense expert regarding other claims about which there was insufficient proof of similarity. The Eighth Circuit reversed plaintiff's verdict, pointing out that the defense expert was "testifying as to his opinions, and any qualified expert must be entitled to do that without having to rebut extraneous

33. See discussion *infra* notes 35-41 and accompanying text.

34. Differences in warnings can be particularly critical in those jurisdictions which recognize a "heeding presumption." In New Jersey, for instance, the courts have held that a plaintiff is entitled to a rebuttable presumption that if an adequate warning had been given, it would have been read and heeded. *Coffman v. Keene Corp.*, 628 A.2d 710, 720 (N.J. 1993) (asbestos case); *Theer v. Philip Carey Co.*, 628 A.2d 724, 729 (N.J. 1993) (asbestos case). See also RESTATEMENT (SECOND) OF TORTS § 402(A) cmt. j (1965), and the following product liability cases (among others) where the heeding presumption has been recognized: *Koonce v. Quaker Safety Prods. & Mfg. Co.*, 798 F.2d 700, 716 (5th Cir. 1986) (involving a safety suit being worn at the time of a fire) (Texas law); *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1539 (D.C. Cir. 1984) (herbicide) (Maryland law); *Payne v. Soft Sheen Prods.*, 486 A.2d 712, 725 (D.C. Ct. App. 1985) (permanent wave solution); *Dias v. Daisy-Heddon*, 390 N.E.2d 222, 225 (Ind. Ct. App. 1979) (BB gun); *Wooderson v. Ortho Pharm. Corp.*, 681 P.2d 1038, 1057 (Kan. 1984) (oral contraceptive); *Wolfe v. Ford Motor Co.*, 376 N.E.2d 143, 147 (Mass. App. Ct. 1978) (motor vehicle); *Butz v. Werner*, 438 N.W.2d 509, 517 (N.D. 1989) (inner tube with harness designed to be pulled with tow rope behind a boat); *Cunningham v. Charles Pfizer & Co.*, 532 P.2d 1377, 1382 (Okla. 1974) (oral polio vaccine); *Magro v. Ragsdale Bros., Inc.*, 721 S.W.2d 832, 834 (Tex. 1986) (can punch machine); *House v. Armour of America, Inc.*, 886 P.2d 542, 553 (Utah Ct. App. 1994) (bullet-resistant vest), *aff'd*, No. 950088, 1996 Utah LEXIS 108 (Utah Dec. 13, 1996). If one accident involves a product with more adequate warnings (either on-product or in the manual) than those for a product involved in a prior accident, application of the "heeding presumption" would seem to support a contention that this dissimilarity in warnings would make the subsequent accident less likely to occur.

35. 997 F.2d 496 (8th Cir. 1993).

36. *Id.* at 498.

evidence of dissimilar accidents."³⁷ The court also stated that for other accident evidence to be admissible, the proponent of that evidence "must show that the facts and circumstances of the other incident are substantially similar to the case at bar."³⁸ In reversing plaintiff's verdict, the court held that the trial judge had abused his discretion by permitting questioning of the defense expert about other accidents.³⁹

The court in *Drabik* also pointed out that plaintiff's experts alleged that several factors contributed to the conclusion that the nailer in question was unreasonably dangerous, including that "the weight, balance, and design characteristics of the nailer encourage the user to hold and carry the tool with the trigger depressed, thus elevating the danger of discharge through accidental contact."⁴⁰ In finding that the plaintiff had not produced any competent evidence to show whether some of the other accidents were "substantially similar," the court pointed out that "[m]any of these instances involved different model contact trip nailers than the N16CT" (the model involved in the case).⁴¹

In *Prashker v. Beech Aircraft Corp.*,⁴² the court excluded evidence of accidents of structural failure of various aircraft models manufactured by the defendant, noting that there were different models involved and that "[e]vidence of accidents in the first model would not have been sufficiently material to the cause of accidents in the fifth model to justify its admission."⁴³ And in *Uiitts v. General Motors Corp.*,⁴⁴ the court held that further discovery regarding a recall campaign for General Motors engine mounts on Chevrolet Blazer trucks did not have to be provided because the model involved in plaintiff's accident contained four engine mounts and was not subject to the recall campaign, which involved certain Chevrolet Blazers with three engine mounts.⁴⁵

In *Trejo v. Keller Industries*⁴⁶ and *Barker v. Deere & Co.*,⁴⁷ some of the testimony of other accidents sought to be adduced involved both dissimilar products and dissimilar circumstances of the accidents. In *Trejo*, plaintiff was thrown to the ground and sustained injuries when the upper portion of an extension ladder slid down into the base section. He attempted to present evidence of other such occurrences, but the trial court sustained an objection to this proposed evidence. In affirming, the appellate court pointed out that some of the other cases involved ladders with a double rung lock mechanism as opposed to the single lock on the

37. *Id.* at 509.

38. *Id.* at 508.

39. *Id.* at 509.

40. *Id.* at 502.

41. *Id.* at 504.

42. 258 F.2d 602 (3d Cir. 1958).

43. *Id.* at 608.

44. 62 F.R.D. 560 (E.D. Pa. 1974).

45. *Id.* at 562. Unlike the other cases cited, *Uiitts* involved discovery of other accidents. Courts generally — and properly — permit greater latitude in allowing discovery of other accidents than they do in permitting these accidents to be introduced into evidence before the jury.

46. 829 S.W.2d 593 (Mo. Ct. App. 1992).

47. 60 F.3d 158 (3d Cir. 1995).

accident ladder, that one case involved a ladder with different side rails, and that none of the other cases involved an accident which had occurred in the precise manner in which plaintiff's accident occurred.⁴⁸

Barker involved a rather unusual accident and the introduction at trial, through plaintiff's expert, of other accident evidence involving dissimilar products and dissimilar accidents. In *Barker*, plaintiff was dragging a log hooked to his tractor with a fifteen-foot-long chain. At one point in this process, the front end of the log became stuck in the ground, causing the rear end of the log to flip over in a pole-vault-type fashion, strike the plaintiff, eject him from his seat, and throw him to the ground, where he was run over by the tractor. Plaintiff's expert claimed there should have been an operator protective system (OPS) for the tractor and, in an attempt to show a defect, testified to accident statistics involving deaths and injuries from tractor accidents in general, rollover accidents, and fatalities occurring as a result of the operator being ejected from his seat and run over or being struck by a falling object.⁴⁹

In reversing plaintiff's verdict, the court in *Barker* held that there was insufficient evidence from which the trial court could find that the prior accidents "were in any way similar to the case before us."⁵⁰ The court continued that the record contained only "raw numbers and statistical extrapolations," "did not contain any specific information with regard to the details of any single accident," and concerned tractors generally, not specifically tractors of the defendant and not the model in question.⁵¹

Even where a similar product is involved, differences in the circumstances of the accidents may make "other accident" evidence irrelevant.⁵² As the court stated in *Drabik v. Stanley-Bostitch, Inc.*,⁵³ "[t]he general rule of limiting the admission of other accident evidence to those events which were substantially similar ensures that the focus of the trial stays on the specific type of accident forming the basis of the case."⁵⁴

48. *Trejo*, 829 S.W.2d at 596-97.

49. *Barker*, 60 F.3d at 161-62.

50. *Id.* at 163.

51. *Id.*

52. For instance, in a case such as *Trejo v. Keller Industries*, 829 S.W.2d 593 (Mo. Ct. App. 1992), involving a telescoping top (fly) section of an extension ladder, it would be unfairly prejudicial and irrelevant to permit evidence of prior injuries from a ladder tipping over, even if one were to allege "similarity" because both accidents involve "ladder stability of the section on which the plaintiff was standing." Similarly, in a pneumatic nailer claim in which a worker discharged an unwanted second nail in a rapid "double-firing" while in the process of nailing, causing a ricochet and consequent eye injury, it would be unreasonable and unfairly prejudicial to permit evidence of accidents such as in *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496 (8th Cir. 1993), where a worker was not in the process of nailing but was carrying the nailer with the trigger depressed and made direct contact with a coworker. Although one could allege that both nailer accidents were similar because they involved "inadvertent actuation," it is also obvious that an accident definition can be so broad as to be all-encompassing, and thus meaningless.

53. 997 F.2d 496 (8th Cir. 1993).

54. *Id.* at 509.

The decision in *General Motors Corp. v. Moseley*⁵⁵ illustrates what can happen when evidence of other accidents comes into a case without proof of substantial similarity. *Moseley* involved the death of a driver of a 1985 GMC pickup truck which was struck on the driver's side by another pickup truck. The side saddle fuel tank on the truck of plaintiffs' decedent ruptured, bursting into flames and burning the decedent. Even though plaintiffs' counsel presented no evidence of similar incidents, he repeatedly referred to 120 law suits (and occasionally to an estimated 240 deaths) from other accidents and made further references to these other accidents despite a ruling in favor of General Motors on this issue on a motion in limine. The jury returned a verdict of \$4,241,611.84 for compensatory damages and assessed \$101,000,000 against the defendant in punitive damages. This verdict was reversed, however, as a result of the unfair prejudice sustained by the defendant. As the court stated, "[w]ithout a showing of substantial similarity, the evidence is irrelevant as a matter of law"⁵⁶

The court in *Moseley* also pointed out that the issue it was considering was neither relevance nor the permissible use of "other accident" evidence, but instead, "the foundational requirements for admission of that type of evidence."⁵⁷ It is, of course, critical to make the distinction between whether evidence of prior accidents is admissible and whether a party has satisfied the foundational requirements for admission. The fact that a jurisdiction may permit evidence of other accidents for certain purposes does not mean that the "other accident" evidence is admissible *without* sufficient proof of similarity and satisfaction of the other foundational requirements for admission.

D. Unfair Prejudice, Confusion of Issues, Misleading the Jury, Undue Delay, Waste of Time, or Cumulative Evidence

Under Federal Rule of Evidence 403, even evidence that is relevant "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."⁵⁸ "Unfair prejudice" in this rule means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."⁵⁹

The potential for unfair prejudice from the introduction of "other accident" evidence is clear from *General Motors Corp. v. Moseley*,⁶⁰ where the jury awarded \$101,000,000 in punitive damages, and *Drabik v. Stanley-Bostitch, Inc.*,⁶¹ where

55. 447 S.E.2d 302 (Ga. Ct. App. 1994).

56. *Id.* at 306 (quoting *Carlton Co. v. Poss*, 183 S.E.2d 231, 233 (Ga. Ct. App. 1971)).

57. *Id.* at 307.

58. FED. R. EVID. 403.

59. FED. R. EVID. 403 advisory committee's note. As one court correctly pointed out, however, "'unfair prejudice' as used in Rule 403 is not to be equated with testimony simply adverse to the opposing party. Virtually all evidence is prejudicial or it isn't material. The prejudice must be 'unfair.'" *Ramos v. Liberty Mut. Ins. Co.*, 615 F.2d 334, 340 (5th Cir. 1980).

60. 447 S.E.2d 302 (Ga. Ct. App. 1994).

61. 997 F.2d 496 (8th Cir. 1993).

the jury awarded \$7,500,000 in punitive damages. Both of these verdicts were set aside based upon the unfair prejudice created by "other accident" evidence, and the Eighth Circuit Court of Appeals in *Drabik* held that the defendant was entitled to judgment as a matter of law on the punitive damages issue. As the court pointed out in *Drabik*, "evidence of other injuries may also raise extraneous controversial points, lead to a confusion of issues, and present undue prejudice disproportionate to its usefulness."⁶² A similar position had previously been taken by the court in *McKinnon v. Skil Corp.*,⁶³ which stated that:

Even when substantial identity of the circumstances is proven, the admissibility of such evidence [of prior accidents] lies within the discretion of the trial judge who must weigh the dangers of unfairness, confusion, and undue expenditure of time in the trial of collateral issues against the factors favoring admissibility.⁶⁴

In *Brooks v. Chrysler Corp.*,⁶⁵ the trial court refused to permit evidence of other consumer complaints and responses to questionnaires in a claim by plaintiffs for injuries and death resulting from alleged brake piston seizure. In affirming under Rule 403 of the Federal Rules of Evidence, the court of appeals pointed to the minimal probative value of the proposed evidence and the delay which would result, stating that "Chrysler would have attempted to rebut the substance of *each* of the 330 complaints or to distinguish the nature of the complaints contained therein from the alleged defect in this case."⁶⁶ And in *Post v. Manitowoc Engineering Corp.*,⁶⁷ a case involving collapse of a crane manufactured by the defendant, the court unanimously agreed with the refusal of the trial judge to allow the plaintiffs to introduce evidence relating to a prior collapse of one of defendant's cranes.⁶⁸ As the court stated, "[t]his would have simply raised collateral issues in an already very complicated case."⁶⁹

Since mere allegations of claims and lawsuits constitute hearsay, a party seeking to introduce competent proof of other accidents ought to be required to produce testimony of witnesses with personal knowledge of these other accidents. This requirement would normally be fulfilled by producing live witnesses or de bene esse deposition testimony where witnesses are subject to cross-examination by the defendant.⁷⁰ Live testimony and the reading of prior testimony from an earlier case

62. *Id.* at 508.

63. 638 F.2d 270 (1st Cir. 1981).

64. *Id.* at 277; accord *Rye v. Black & Decker Mfg. Co.* 889 F.2d 100, 103 (6th Cir. 1989).

65. 786 F.2d 1191 (D.C. Cir. 1986).

66. *Id.* at 1198.

67. 211 A.2d 386 (N.J. Super. Ct. App. Div. 1965).

68. *Id.* at 391.

69. *Id.*

70. While it might be argued that deposition or trial testimony from claims by other plaintiffs against the same defendant should be permitted, such an argument ignores the fact that the defendant's motive in taking the depositions or questioning the witnesses in the other matters may well have been different from what the motive would be if the witnesses were to testify live in the present matter to prove similarity of the accidents. For instance, a defendant may wish at a deposition, or during a

were, in fact, utilized by the plaintiff in *Drabik* as proof of the other accidents, in addition to the cross-examination of the defense expert about other accidents which was held to have been improper.⁷¹

An issue which the trial judge will have to address, however, is whether one case—plaintiff's claim in the case before the court—is to be tried, or whether there are to be a number of mini-trials regarding the facts of each of the other accidents sought to be proven.⁷² If there is a dispute as to whether earlier accidents or products are "similar," the defendant should certainly have the opportunity to cross-examine witnesses as to the earlier accidents and produce other evidence, if desired, to controvert the claims of similarity.⁷³ The risk of confusion, waste of time, and undue prejudice is evident, however, if these mini-trials are to occur.⁷⁴

plaintiff's testimony at trial, not to dispute the plaintiff's version of an accident, feeling content that other testimony or evidence at trial will make clear that the accident did not occur as plaintiff claims. The defendant also may not contest a plaintiff's version of the accident which is suspicious because in the particular case, that version is favorable to the defendant. If the purpose of the "other accident" testimony, however, is to show similarity to a later claim, the defendant would be expected to address this issue directly and frame the questioning differently. If a court at a later trial permits the prior testimony as proof that the other accident in fact occurred in the manner to which testified, the court would be ignoring this difference in motive. Under FED. R. EVID. 804(b)(1) and related state rules, prior testimony is not evidential unless the party against whom it is offered has the same motive as the party against whom it was previously offered. Accordingly, unless it is clear that there was the same motive, live or de bene esse testimony from the witness should be required in the instant matter if proof of similarity is needed. Of course, if the defendant admits the manner in which another accident occurred, testimony on this issue would be unneeded.

71. *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 508 (8th Cir. 1993). In *Drabik*, the prior testimony which was read into the record from an earlier case was admitted over the objection of the defendant, and the Eighth Circuit Court of Appeals upheld the admission of this testimony into evidence. *Id.* There is nothing in the published opinion to indicate whether an issue was raised as to the similarity of defendant's motive between the prior questioning of this witness in his own case and the facts for which his testimony was produced in *Drabik*.

72. In *DePue v. Sears, Roebuck & Co.*, 812 F. Supp. 750, 751 (W.D. Mich. 1992), for instance, plaintiff sought to introduce evidence about 10 other allegedly similar accidents involving the same bolt action shotgun. The defendant disputed the cause of the other accidents, as well as the cause of plaintiff's accident. *DePue*, 812 F. Supp. at 751. In granting defendant's motion in limine to exclude evidence of the other accidents, the court stated that

allowing plaintiff to attempt to prove that the other incidents are substantially similar to the accident at issue here during the course of this trial would result in ten not-so-mini-but-actually-large sub-trials. Under FRE 403, I find that the likelihood of jury confusion, along with the undue expenditure of time on these other issues, substantially outweigh any probative value to be gained from this evidence.

Id. at 753-54. See also *supra* text accompanying note 54.

73. See, e.g., *Becker v. American Airlines*, 200 F. Supp. 243, 245 (S.D.N.Y. 1961) (stating that the defendants charged with prior alleged malfunctions of the same model of altimeter "must have full opportunity to explore the reasons" for the alleged malfunctions).

74. A good example of the problem which can arise, even with only one other accident, is discussed in *Wilson v. Bicycle South, Inc.*, 915 F.2d 1503 (11th Cir. 1990), where plaintiff sought to introduce evidence of an allegedly similar collapse of another wheel manufactured and assembled by two of the defendants. As the court stated: "The cause of the alleged similar incident had never been established because that case settled out of court. The parties in the instant case vigorously dispute the actual cause, demonstrating that even had the trial court reached the issue of whether the two incidents were similar

At trial in *Uitts v. General Motors Corp.*,⁷⁵ plaintiff sought to introduce into evidence, among other things, thirty-five reports of allegedly similar accidents. The court stated that "[p]roof of prior accidents or occurrences are [sic] not easily admitted into evidence, since they [sic] can often result in unfair prejudice, consumption of time and distraction of the jury to collateral matters."⁷⁶ The court continued that to minimize the prejudicial effect of the reports, the defendant

would have had to go through each one individually with the jury. The result would have been a mini-trial on each of the thirty-five reports offered by plaintiffs. This would lengthen the trial considerably and the minds of the jurors would be diverted from the claim of the plaintiffs to the claims contained in these reports.⁷⁷

The court in *Uitts* also pointed out that permitting reports containing hearsay into evidence "would be tantamount to allowing the persons making the statements to testify against defendant without being subject to cross examination or required to take an oath. Therefore, any probative value these reports might have is outweighed by their prejudicial nature."⁷⁸ In *John McShain, Inc. v. Cessna Aircraft Co.*,⁷⁹ reports relating to thirty other accidents were excluded in part because the probative value of the proffered evidence was outweighed by the probability of delay and waste of time.⁸⁰ In *Wolf v. Procter & Gamble Co.*,⁸¹ the court pointed out that "[a] detailed analysis would have to be made of each complaint in order to determine whether the facts were similar enough to . . . [plaintiffs'] complaint to constitute notice to defendants of the particular problem with . . . [the product involved] that is the subject of this litigation."⁸²

When proof of other accidents is admitted, some courts have limited the amount of testimony on the grounds that, at a certain point, the evidence becomes cumulative. In *Wheeler v. John Deere Co.*,⁸³ for example, plaintiff sought to introduce live testimony of ten individuals who had been injured while cleaning unloading augers on a particular series of combine manufactured by the defendant. The trial court limited this testimony to five of the witnesses, finding that testimony from the other five would be cumulative.⁸⁴ This portion of the trial court's holding was affirmed,⁸⁵ although plaintiff's verdict was reversed due to the improper use of "other accident" evidence during cross-examination of the defense expert.⁸⁶

this issue would have required a trial within a trial." *Id.* at 1510 n.10. The problem is compounded when numerous other accidents are sought to be admitted.

75. 411 F. Supp. 1380 (E.D. Pa. 1974), *aff'd*, 513 F.2d 626 (3d Cir. 1975).

76. *Id.* at 1383.

77. *Id.*

78. *Id.* at 1382-83.

79. 563 F.2d 632 (3d Cir. 1977).

80. *Id.* at 636.

81. 555 F. Supp. 613 (D.N.J. 1982).

82. *Id.* at 622.

83. 862 F.2d 1404 (10th Cir. 1988).

84. *Id.* at 1408.

85. *Id.*

86. See *infra* Part III.G. The evidence of the other accidents in *Wheeler* was found to have been

III. Reasons Advanced for the Admissibility of "Other Accident" Evidence

With the above foundational requirements in mind, one can more easily evaluate the arguments which have been advanced as to why evidence of other accidents should be admitted. These arguments include those set forth below.

A. Proving the Existence of a Condition or Defect

Whether or not a product has a particular condition or characteristic is rarely in dispute. A manufacturer is unlikely to dispute, for example, that a band saw is capable of severing one's fingers, a ladder is capable of tipping over if unbalanced, or a punch press is capable of crushing a hand which is inserted into it.⁸⁷ The manufacturer can be expected to dispute, however, that the characteristic of the product which leads to the injury, or which led to prior injuries, is a defect. The question, therefore, is whether the court should permit the existence of other similar accidents to be considered by a jury as evidence that a product defect does, in fact, exist.⁸⁸ An analysis indicates that this should not be permitted, since the evidence has no probative value on this issue⁸⁹ and is highly prejudicial to the defendant.

Accidents can happen in a multitude of ways, and the mere fact that an accident has occurred with a product does not mean that the product was defective.⁹⁰ In fact, in no jurisdiction is the existence of the accident in suit evidence of a product defect by itself,⁹¹ nor should it be.⁹² Allowing the mere existence of a *previous*

admitted properly to show the existence of a defect. As argued *infra* in Part III.A, this is not a proper purpose of such evidence.

87. See, e.g., *Rye v. Black & Decker Mfg. Co.*, 889 F.2d 100, 103 (6th Cir. 1989) (holding that admission of knowledge by the manufacturer that its circular saws could kick back was sufficient to preclude evidence of prior kickback accidents to show notice).

88. When this is allowed, "the jury is invited to infer from the presence of other accidents that a design defect existed which contributed to the plaintiffs' injuries." *Barker v. Deere & Co.*, 60 F.3d 158, 162-63 (3d Cir. 1995).

89. As indicated *infra* in Part III.C, under certain circumstances evidence of other similar accidents may properly be admitted to show the extent of the risk in a balancing of a product's risk against its utility. However, the issue of the existence of a risk is a different one from the issue of the existence of a defect, and a jury instruction that other accidents can be considered as evidence of a risk has a much different impact from one which tells the jury that other accidents can be considered as evidence of a defect.

90. Dean Wade has stated that "[s]trict liability for products is clearly not that of an insurer. If it were, a plaintiff would need only to prove that the product was a factual cause in producing his injury." John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 828 (1973); see also John W. Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 13 (1965). The New Jersey Supreme Court has spoken similarly, stating that "[a]n inference of defectiveness may not be drawn from the mere fact that someone was injured," *Zaza v. Marquess & Nell, Inc.*, 675 A.2d 620, 627 (1996), and pointing out that the requirement to prove a defect as part of a *prima facie* case "distinguishes strict from absolute liability, and thus prevents the manufacturer from also becoming the insurer of a product," *id.* at 627-28 (quoting *O'Brien v. Muskin Corp.*, 463 A.2d 298, 303 (N.J. 1983)).

91. Even in an American Law Reports annotation entitled *Strict Products Liability: Product Malfunction or Occurrence of Accident as Evidence of Defect*, the author's reference to cases allegedly supporting the proposition in the title speaks of cases with the "view that a *prima facie* case of

accident to be used in the pending suit as evidence of a product defect, however, is tantamount to saying that because the other accident occurred first, it can now be used as evidence of a product defect, even though it could not have been so used in a claim arising from the previous accident. Such a distinction based upon the priority of the occurrence is an artificial and illogical one. Indeed, permitting the mere existence of a prior accident to be used to show a defect would be approaching a standard of absolute, not strict, liability.⁹³ As the Oregon Supreme Court stated in *Phillips v. Kimwood Machine Co.*,⁹⁴ a case involving a sanding machine, "[n]o one wants absolute liability where all the article has to do is to cause injury."⁹⁵

Nevertheless, many courts have stated that other accidents, if sufficiently similar, are admissible to prove a product defect.⁹⁶ A reason for this conclusion, however, is rarely given, and the conclusion cannot be supported.

In fact, there is virtually no product with which it is impossible to be injured. A product capable of penetrating wood, for instance, cannot be rendered incapable of penetrating flesh and bone. The mere fact that it has done so before does not render that product defective, nor should it be considered to provide evidence of a defect. As the court stated in *Hagans v. Oliver Machinery Co.*,⁹⁷ a case involving a table saw:

Unfortunately, the nature of the [construction] industry is such that its tools, from the smallest tack hammer to the largest earth mover, expose certain risks of harm to their users. Nevertheless, unless civilization is to grind to a halt, these tools, including industrial table saws, must continue to be marketed despite their inherent dangers.⁹⁸

defectiveness can be made by proof of the fact of a malfunction, failure, or occurrence of an accident *in conjunction with other circumstantial evidence* such as a lack of an abnormal use of the product and the lack of a reasonable secondary cause not attributable to defectiveness." Christopher H. Hall, Annotation, *Strict Products Liability: Product Malfunction or Occurrence of Accident as Evidence of Defect*, 65 A.L.R.4TH 346, § 3 (1988) (emphasis added).

92. Allowing the existence of an accident to be evidence of a defect would be taking one element of the *res ipsa loquitur* doctrine — the element that "the event must be of a kind which ordinarily does not occur in the absence of negligence," W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 39, at 244 (5th ed. 1984) — and wrongly standing it on its head to suggest that the mere fact that an accident occurred with a product means that such an accident "ordinarily does not occur in the absence of a product defect."

93. See *supra* note 90.

94. 525 P.2d 1033 (Or. 1974).

95. *Id.* at 1036. It is probably too broad a statement to suggest that *no* one wants this result.

96. See, e.g., *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 508 (8th Cir. 1993) (plaintiff struck in head by a nail discharged by a coworker from a pneumatic nailer ("nail gun")); *Cooper v. Firestone Tire & Rubber Co.*, 945 F.2d 1103, 1105 (9th Cir. 1991) (multipiece truck rim explosively separated during servicing); *Wheeler v. John Deere Co.*, 862 F.2d 1404, 1408 (10th Cir. 1988) (plaintiff's arm became tangled in unloading auger of combine); *McKinnon v. Skil Corp.*, 638 F.2d 270, 277 (1st Cir. 1981) (foot injury from portable electric saw).

97. 576 F.2d 97 (5th Cir. 1978).

98. *Id.* at 101.

The same can be said of products from a wide variety of other industries. Even a sharpened pencil, though nondefective, is capable of causing a serious eye injury.⁹⁹

Most courts have made clear that the mere happening of an accident while using a product is insufficient to prove that the product is defective.¹⁰⁰ If this is so for the accident in question, it should be equally so for prior accidents.

B. Proving Causation

While a number of courts and commentators have used the general term "causation" as one potential reason for admitting evidence of other accidents,¹⁰¹ there are actually three different issues involved. These issues are the use of evidence of other accidents to prove: (1) that it was *possible* that the present accident was caused in the manner alleged; (2) that the present accident was caused in the same manner as the other accident was caused; or (3) that the present accident was caused by a defect or dangerous condition. The courts rarely distinguish these issues, however, and this lack of distinction can lead to confusion.

The first causation issue which can arise is whether or not a causal relationship is even possible. Louisell and Mueller mention that "[b]y foolish overstatement or supreme confidence, a defendant may assert that an accident simply could not have occurred in the manner which plaintiff asserts."¹⁰² If a defendant makes this assertion, proper evidence of similar accidents would be quite relevant and should be admissible to show that an accident could occur in the manner claimed. *Wojciechowski v. Long-Airdox Division of Marmon Group*¹⁰³ is a good example of proper admission for this purpose.

In *Wojciechowski*, plaintiff alleged he was injured by the improper discharge of a compressed air blasting device used in the extraction of coal. The defendant claimed that the design of the device made impossible a misfiring caused by air retention, and in order to refute this claim, the plaintiff and several co-employees were permitted by the trial court to testify about other incidents of improper

99. Such an injury occurred to a school child in *Ohman v. Board of Education*, 90 N.E.2d 474 (N.Y. 1949), although claim was brought against the board of education and school personnel for alleged lack of supervision rather than against the product manufacturer.

100. See, e.g., *Gates v. Ford Motor Co.*, 494 F.2d 458, 459 (10th Cir. 1974) (applying Oklahoma law); *Bruther v. General Elec. Co.*, 818 F. Supp. 1238, 1241 (S.D. Ind. 1993); *Brooks v. Colonial Chevrolet-Buick*, 579 So. 2d 1328, 1332 (Ala. 1991); *Williams v. Smart Chevrolet Co.*, 730 S.W.2d 479, 482 (Ark. 1987); *Depre v. Power Climber, Inc.*, 635 N.E.2d 542, 544 (Ill. App. Ct. 1994); *Spott v. Otis Elevator Co.*, 601 So. 2d 1355, 1364 (La. 1992); *Virgil v. Kash N'Karry Serv. Corp.*, 484 A.2d 652, 657 (Md. Ct. Spec. App. 1984); *Zaza v. Marquess & Nell, Inc.*, 675 A.2d 620, 627 (N.J. 1996); *Woodin v. J.C. Penney Co.*, 629 A.2d 974, 976 (Pa. Super. Ct. 1993); *Fulton v. Pfizer Hosp. Prods. Group*, 872 S.W.2d 908, 911 (Tenn. Ct. App. 1993); *Selig v. BMW of North America, Inc.*, 832 S.W.2d 95, 100 (Tex. App. 1992, no writ).

101. See, e.g., *McKinnon v. Skil Corp.*, 638 F.2d 270, 277 (1st Cir. 1981); *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 456, 508 (8th Cir. 1993) ("Evidence of other accidents may be relevant to . . . causation."); *Weeks v. Remington Arms Co.*, 733 F.2d 1485, 1491 (11th Cir. 1984) ("Evidence of similar accidents might be relevant to . . . causation."); 1 WEINSTEIN & BERGER, *supra* note 3, ¶ 401[10].

102. 1 DAVID W. LOISELL & CHRISTOPHER B. MUELLER, *FEDERAL EVIDENCE*, § 98 (1977). The "supreme confidence" occasionally may be justified, however.

103. 488 F.2d 1111 (3d Cir. 1973).

discharge of air from identically designed devices.¹⁰⁴ The court of appeals affirmed the trial court on this issue, pointing out that the "defendant had full opportunity to cross-examine plaintiff's witnesses to develop any significant differences in circumstances that it deemed relevant."¹⁰⁵

If a defendant does not have full opportunity to cross-examine as to the facts surrounding the other accidents sought to be admitted, however, and if causation of those accidents is contested, it would be improper to permit evidence of the other accidents as proof in the case under review that a causal relationship is possible. An example of such a lack of opportunity to cross-examine would be a situation where a plaintiff merely attempts to introduce evidence that other *claims* have been made that an accident occurred in a particular manner, which is pure hearsay.

A second causation issue arises when there is an attempt to use "other accident" evidence to prove that the accident under review was caused in the same manner as one or more other accidents. In *Ramos v. Liberty Mutual Insurance Co.*,¹⁰⁶ plaintiffs were injured when the mast of an oil drilling rig on which they were working collapsed, telescoping within itself. At trial, plaintiffs sought to introduce evidence that approximately two years earlier, another similar rig collapsed when the pins connecting the upper third of the telescoping mast to the middle third failed.¹⁰⁷ The *Ramos* accident occurred when the pins connecting the lower part of the middle third of the mast to the top part of the bottom third failed.¹⁰⁸

There were several different theories of accident causation presented by the parties in *Ramos*. One theory was that there was a design defect similar to the defect alleged for the prior accident;¹⁰⁹ another theory was that operator error caused a tool joint to hit the rams and exceed the weight capacity of the mast;¹¹⁰ and a third theory was that there was a different type of defect, for which another defendant was responsible, which caused the rams either not to open or to open too slowly.¹¹¹ The jury, in fact, agreed in a special verdict with the operator error theory.¹¹² Despite the existence of evidence to support all three theories,¹¹³ the appellate court in *Ramos* reversed the trial court's refusal to permit evidence of the prior accident on the issue of the cause of the *Ramos* accident.¹¹⁴

104. *Id.* at 1115-16.

105. *Id.* at 1116.

106. 615 F.2d 334 (5th Cir. 1980).

107. Both masts, though somewhat different and with different load capacities, had been manufactured by the same company using the same design calculations, and the manufacturer admitted that there was very little difference between the two designs. *Id.* at 336-37, 339-40.

108. *Id.* at 337.

109. The prior claim had gone to trial before *Ramos* and resulted in a verdict for plaintiffs. *Id.* at 337-39.

110. *Id.* at 338.

111. See *Ramos v. Liberty Mut. Ins. Co.*, 620 F.2d 464, 467 (5th Cir. 1980) (opinion on petition for rehearing).

112. *Ramos*, 615 F.2d at 337.

113. *Ramos*, 620 F.2d at 467-68.

114. The court also mentioned impeachment of the principal of one of the defendants as being another basis for permitting the evidence of the prior accident. In response to questioning, this witness

The opinion in *Ramos* raises troubling questions concerning the use of other accidents to prove "causation." Substantial problems can arise in permitting a jury to consider the cause of one accident (or of more than one accident) as evidence of the cause of another. An accident or injury involving a product can be produced by a number of different causes. These can include a manufacturing, design, or warning defect, but alternatively (or in conjunction) can involve actions of an employer or other third party (such as by product alteration, improper maintenance, or failure to provide training), product misuse, carelessness, voluntary and unreasonable exposure to a known risk, and even weather conditions.¹¹⁵ Each of these general categories has a number of subcategories.¹¹⁶ Frequently the causes of both the other accident(s) and the accident under review are disputed, which can require litigation of the cause of each accident.¹¹⁷

Even if one accident is proven — or admitted — to have occurred in a certain manner, this fact does not mean that another accident occurred in the same manner, nor does it have sufficient probative value to warrant admission on the issue of causation.¹¹⁸ Further, allowing a jury to consider one accident as evidence of the causation of another accident can be extremely misleading, distract the jury from the accident under consideration, and be unfairly prejudicial.¹¹⁹ The major problem, as stated by the court in *Nachtsheim v. Beech Aircraft Corp.*,¹²⁰ is that "the jury might infer from evidence of the prior accident alone that ultra-hazardous conditions existed . . . and were the cause of the later accident without those issues ever having been proved."¹²¹ Such an inference would be improper.

The third issue regarding the use of other accidents to show "causation" concerns whether the other accidents can be evidence that a defect or dangerous condition caused the accident in the case under review.¹²² The use of such evidence for this

falsely denied that the prior rig had fallen, and the trial court permitted no evidence to counter this false statement and gave no charge to the jury to soften its effect. *Ramos*, 615 F.2d at 340.

115. See *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1269 (7th Cir. 1988) (affirming the trial judge's refusal to permit plaintiff to introduce evidence of another air crash with an identical airplane involving, as did the accident in question, icing conditions). The court found "too few established facts . . . from which a comparison between the two accidents can be made." *Id.* at 1269.

116. For example, there are different types of design defects (which could affect the liability of different parties, such as component part manufacturers), a large variety of different actions by third persons, and a number of ways in which the actions of the plaintiff could cause an accident.

117. See *supra* Part II.D.

118. There is an exception, however, as to the probative value of certain other similar incidents which are proven to have occurred at the same time, such as multiple food poisonings to diners at a restaurant who all consumed the same dish, or multiple injuries to horses at various locations who all became ill after eating the same batch of tainted animal feed. These exceptions, though, involve defects which have occurred during the manufacturing or distribution process and do not involve design or warning defects in the items consumed.

119. Of course, if a plaintiff is permitted to present evidence of other "similar" accidents to show that the accident under review had the same cause, should not a defendant also be permitted to produce evidence of other apparently "similar" accidents resulting from different causes?

120. 847 F.2d 1261 (7th Cir. 1988).

121. *Id.* at 1269 (quoting *Gardner v. Southern Ry. Sys.*, 675 F.2d 949, 952 (7th Cir. 1982)).

122. See, e.g., *Bailey v. Kawasaki-Kisen, K.K.*, 455 F.2d 392, 397 (5th Cir. 1972); 1 STRONG, *supra*

purpose is actually a combination of two separate factors, that of defect and that of causation. As previously discussed, "other accident" evidence is improper to prove a dangerous condition or defect,¹²³ and as suggested above,¹²⁴ there are substantial problems that arise in the use of evidence that one accident was caused in a certain manner to prove that another accident was caused the same way. Combining two improper purposes for "other accident" evidence does not make one proper purpose. Accordingly, there is no justification for the introduction of such evidence as proof of causation by a defect or dangerous condition.

Whether a particular *condition* of a product was involved in the cause of an accident is, of course, quite different from a determination as to whether that condition constitutes a defect or dangerous condition. There may be no dispute as to the former, but invariably there will be a dispute as to whether that condition is a defect. When there is no dispute about whether a condition of a product was involved in the cause of an accident, proof on this issue is unnecessary.¹²⁵

C. Proving the Extent of the Risk Created

Many jurisdictions incorporate a risk/utility analysis as a basis for determining whether a product is defective in design.¹²⁶ One theory for the admissibility of "other accident" evidence is that evidence of other similar accidents is relevant and admissible in assessing the risk (or lack thereof) in a product so that the jury can make a risk/utility analysis and consider the safety aspects of the product — the likelihood that it will cause injury and the probable seriousness of the injury.¹²⁷ This theory, in fact, was adopted by the New Jersey Supreme Court in considering the issue of "other accident" evidence in *Ryan v. KDI Sylvan Pools, Inc.*¹²⁸ In

note 2, § 200.

123. See *supra* Part III.A.

124. See *supra* text accompanying 119.

125. See *supra* text accompanying notes 6-7.

126. The factors in such a risk/utility analysis were suggested by Dean Wade in his influential article, *On the Nature of Strict Tort Liability for Products*, 44 *MISS. L.J.* 825 (1973). These factors are: (1) The usefulness and desirability of the product — its utility to the user and to the public as a whole; (2) The safety aspects of the product — the likelihood that it will cause injury, and the probable seriousness of the injury; (3) The availability of a substitute product which would meet the same need and not be as unsafe; (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility; (5) The user's ability to avoid danger by the exercise of care in the use of the product; (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions; and (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance. *Id.* at 837-38. Some of the cases utilizing a risk/utility analysis are: *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 455 (Cal. 1978); *Auburn Mach. Works Co. v. Jones*, 366 So. 2d 1167, 1170 (Fla. 1979); *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 253 (Miss. 1993); *Johansen v. Makita USA, Inc.*, 607 A.2d 637, 642 (N.J. 1992); *Voss v. Black & Decker Mfg. Co.*, 450 N.E.2d 204, 208 (N.Y. 1983); *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033, 1039 (Or. 1974); *Foley v. Clark Equip. Co.*, 523 A.2d 379, 382, 388 (Pa. 1987); *Turner v. General Motors Corp.*, 584 S.W.2d 844, 848-49 (Tex. 1979).

127. This is factor (2) in Dean Wade's analysis, *supra* note 126.

128. 579 A.2d 1241, 1248 (N.J. 1990). *Ryan*, however, involved an attempt by the defendant to

Exum v. General Electric Co.,¹²⁹ the court overturned a directed verdict for the defendant, based in part upon the trial court's refusal to permit evidence of other accidents to allow the jury to assess one side of the balance — the likelihood and gravity of harm — in considering a "danger-utility" test.¹³⁰ In *Drabik v. Stanley-Bostitch, Inc.*,¹³¹ the court referred to other accidents being relevant to show "the magnitude of the danger."¹³²

If, in fact, there is proper evidence presented — within the parameters indicated below in this section and with all proper foundational requirements fulfilled¹³³ — evidence of other accidents can serve a useful purpose in helping to determine the extent of the risk of an injury of the type in question. However, there are a number of questions to be resolved before this evidence is admitted.

The first question which arises in considering whether "other accident" evidence should be permitted to show the "extent of the risk" is: What is the risk for which the extent is to be determined? It surely cannot be the risk of *an* accident occurring. Accidents can happen in many different ways, and permitting evidence of one type of accident is not relevant and is surely misleading as to the risk of another type of accident occurring.¹³⁴ The accidents must be similar in order to assess risk.

An example of what would initially appear to be two "similar" lawnmower accidents, each involving blade contact with the operator and a resultant amputation injury, reveals how very different the risks can be. In *Bell v. Montgomery Ward*,¹³⁵ for instance, plaintiff was operating a lawnmower, slipped on wet grass while going

show the small number of similar accidents from similar pools in order to convince the jury of the minimal nature of the risk from the pool design under review.

129. 819 F.2d 1158 (D.C. Cir. 1987).

130. *Id.* at 1163.

131. 997 F.2d 496 (8th Cir. 1993).

132. *Id.* at 508. The "magnitude of the danger," of course, is merely another way of phrasing "the extent of the risk."

133. See *supra* Parts II.A-D. One of the foundational requirements, similarity of product, was addressed with respect to "risk-benefit" in *Deans v. Allegheny Int'l (USA)*, 590 N.E.2d 825 (Ohio Ct. App. 1990), where the court stated that "the raw number of rotary mower accidents nationwide does not pertain to the risks attendant to the specific tractor model under examination." *Id.* at 827.

134. In *Exum v. General Electric Co.*, 819 F.2d 1158 (D.C. Cir. 1987), however, the court appeared to ignore the misleading nature of different types of accidents being considered together on the issue of risk. There, plaintiff was a 19-year-old employee of a fast food chain, was filtering hot grease used in his employer's french fryer, and while he was lifting a six pound pan containing 15 pounds of grease at 350 degrees, a pressurized asthma inhaler dropped from his shirt pocket into the scalding liquid, causing an explosion and burn injuries. Plaintiff sought to introduce evidence of 15 incidents in which young employees were burned while filtering grease with the same model fryer, but this proffer was denied by the district court upon the grounds that the one other incident which involved dropping an object into the grease occurred after the date of plaintiff's accident and the other incidents were not sufficiently similar. The other incidents, according to the court of appeals, "involved slightly different and sundry fact patterns — for example, spillages." *Exum*, 819 F.2d at 1162. Nevertheless, the court of appeals held that all 15 incidents should have been admitted to show the extent of the danger, and further held that all but the one occurring after plaintiff *Exum's* accident should have been admitted to show notice of the dangerousness of the design. *Id.* at 1163. (The opinion is silent as to how many pounds of grease were present initially and how many french fries it took to soak up the difference.)

135. 792 F. Supp. 500 (W.D. La. 1992).

down a slope, and attempted to maintain his balance by pulling back on the handle. This caused his left foot to go under the mower deck and resulted in the loss of portions of two toes.¹³⁶ A completely different type of accident occurred in *Moe v. MTD Products, Inc.*,¹³⁷ where plaintiff sustained an amputation of fingers on his right hand when he reached into a discharge chute of a lawnmower to clear clogged grass. To permit evidence of one of these injuries in the other claim would have no bearing whatsoever upon the "extent of the risk" of the second accident occurring, even though they both involve amputations sustained by an operator as a result of blade contact accidents.

Additionally, even prior incidents where a plaintiff may have reached into the discharge chute of a lawnmower of the same manufacturer to clear clogged grass may have little relevance to the type of accident which occurred in *Moe*, although at first the accidents may appear similar. In *Moe*, the lawnmower was equipped with a blade/brake clutch (BBC) which was designed to stop the rotation of the cutting blade within three seconds of the release of the control lever.¹³⁸ The control cable had frayed, causing a failure of the BBC.¹³⁹ Prior claims of amputation from insertion of the operator's hand into the discharge chute, however, may have occurred on mowers not equipped with a BBC,¹⁴⁰ or if equipped with a BBC, may have been caused by other types of failures or actions. If so, these prior accidents would be meaningless in a lawsuit for a claim such as occurred in *Moe*. Thus, even accidents which initially appear very similar may reveal risks of a very different nature. In this event, one of the accidents should have no relevance to an assessment of the "extent of risk" of the other accident occurring.

In addition to determining similarity of accidents and similarity of products, one must also consider the extent of usage in order to evaluate properly the extent of the risk of a product design or characteristic. Can the existence of five similar accidents with the same model product, for instance, really provide any convincing information without a consideration of the extent of usage of the model? Five similar accidents out of one hundred uses of one hour each of the same model machine may be quite significant as evidence of a high extent of risk. However, five accidents out of many millions of hours of use of the model would reveal a very different risk, even if the accidents occurred in a similar manner.¹⁴¹ Consider-

136. *Id.* at 508.

137. 73 F.3d 179 (8th Cir. 1995).

138. *Id.* at 181.

139. *Id.*

140. See generally *Southland Mower Co. v. Consumer Prod. Safety Comm'n*, 619 F.2d 499 (5th Cir. 1980) (discussing various lawnmower injury scenarios and the promulgation of the Consumer Product Safety Commission requirements for lawnmower safety).

141. In *Sturm v. Clark Equipment Co.*, 547 F. Supp. 144, 145 (W.D. Mo. 1982), *aff'd*, 732 F.2d 161 (8th Cir. 1984), the court permitted defense testimony that there was no knowledge of any other similar accident in 74,000 machine years of usage of 34,000 machines. Assuming that plaintiff had attempted to introduce evidence of three similar accidents in *Sturm* as indicating the extent of the risk in a risk/utility analysis, would that testimony really have had any probative value without knowing the extent of usage of the product? See *Johnson v. Ford Motor Co.*, 988 F.2d 573, 581 (5th Cir. 1993) (refusing to permit evidence of dissimilar incidents, indicating that the other incidents which plaintiff sought to

ing only the number of accidents and not the extent of usage, as some courts permit, is like attempting to evaluate a fraction by looking at only the numerator and ignoring the denominator. The extent of risk cannot be determined in such a manner. Accordingly, a failure to consider the extent of usage does not permit a proper balancing of risk against utility.

D. Proving that the Defendant Knew or Should Have Known of the Dangers of the Product

Some courts have held that proof of other accidents is admissible to show the defendant's notice of a dangerous condition.¹⁴² In *Jackson v. Firestone Tire & Rubber Co.*,¹⁴³ for instance, the court stated, "[f]or purposes of proving other accidents in order to show defendants' awareness of a dangerous condition, the rule requiring substantial similarity of those accidents to the accident at issue should be relaxed."¹⁴⁴

The rule which generally is followed is that where other accidents are offered to prove notice, a lack of exact similarity of conditions will not result in exclusion of the evidence "provided the accident was of a kind which should have served to warn the defendant."¹⁴⁵ Why this should be so, however, is unclear, as indicated by the court in *General Motors Corp. v. Moseley*.¹⁴⁶ In *Moseley*, where plaintiffs¹⁴⁷ counsel repeatedly referred to other claims and deaths from other accidents without presenting evidence of similarity, plaintiffs asserted that substantial similarity did not have to be shown because the evidence of other accidents was only being offered to show notice of a defect rather than the existence of a defect. The court, however, held that "without a showing of substantial similarity, the evidence is irrelevant as a matter of law"¹⁴⁸ and stated, "[t]he plaintiffs' argument begs the question, notice of what defect? If the relative defects are not similar, how can one be notice of the other?"¹⁴⁹ A number of other courts also have not relaxed the requirement of "substantial similarity" for attempting to prove notice of a defect.¹⁵⁰

introduce amounted to "2/1000 of one percent of the approximately 3 to 5 million Escorts sold during the 1980s").

142. See, e.g., *Wheeler v. John Deere Co.*, 862 F.2d 1404, 1407-08 (10th Cir. 1988); *Jackson v. Firestone Tire & Rubber Co.*, 788 F.2d 1070 (5th Cir. 1986).

143. 788 F.2d 1070 (5th Cir. 1986).

144. *Id.* at 1083. The court in *Jackson* further stated that any differences in the circumstances surrounding the accident go to the weight, rather than the admissibility, of the evidence. *Id.*

145. 1 WEINSTEIN & BERGER, *supra* note 3, ¶ 401[10], at 401-67 to -68.

146. 447 S.E.2d 302, 306 (Ga. Ct. App. 1994).

147. Where reference is made to "plaintiffs," this reference is to the Moseleys, the original plaintiffs in the lawsuit.

148. *Id.*

149. *Id.* at 307.

150. See, e.g., *Cooper v. Firestone Tire & Rubber Co.*, 945 F.2d 1103, 1105 (9th Cir. 1991); *Pettyjohn v. Kalamazoo Ctr. Corp.*, 868 F.2d 879, 881 (6th Cir. 1989); *General Motors Corp. v. Lupica*, 379 S.E.2d 311, 314 (Va. 1989). However, other courts have relaxed the requirement. See, e.g., *Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434, 1440 (10th Cir. 1992); *Shields v. Sturm, Ruger & Co.*, 864 F.2d 379, 381 (5th Cir. 1989); *McGonigal v. Gearhart Indus.*, 851 F.2d 774, 778 (5th Cir. 1988); *Ponder v. Warren Tool Corp.*, 834 F.2d 1553, 1560 (10th Cir. 1987).

Notice of a hazard or danger, however, is not the same as notice of a defect. The possibility that one can be injured while using a product does not make that product defective or unreasonably dangerous.¹⁵¹ In fact, a manufacturer will rarely contest knowledge that there are certain risks or dangers resulting from the use of its product.¹⁵² If there is no dispute as to the existence of a hazard or danger, there is no reason for a jury to hear about other accidents to "prove" knowledge of that hazard or danger, and such evidence is irrelevant.

Further, under a strict liability analysis, some courts have held that there is an assumption that a manufacturer knew the dangers and propensities of its product.¹⁵³ If the applicable law is that the defendant is assumed to know of the dangers of the product, then there would be no need to prove such knowledge, and attempts to prove it by "other accident" evidence would be superfluous.¹⁵⁴ Even in a jurisdiction where the law does not assume the manufacturer's knowledge of the dangers of the product, knowledge of the dangers is rarely in dispute.¹⁵⁵ Evidence of other chain saw accidents, for example, is not needed to prove notice that there are dangers from operating a chain saw.¹⁵⁶ Indeed, for this product and numerous others, there are detailed warnings contained in owners' manuals and/or on the product which clearly identify the manufacturer's knowledge of the dangers of its product. If such knowledge is either presumed or admitted, then it is clear that "other accident" proof is unnecessary to prove this knowledge.

Finally, where courts permit evidence of other accidents to be utilized on the issue of notice of a dangerous condition, it is obvious that subsequent accidents are not admissible for this purpose, as they are not relevant to this issue.¹⁵⁷

151. See *supra* notes 91-99 and accompanying text.

152. Certain types of dangers might not be known, however, particularly from prescription drugs or certain types of chemicals. This may be due to the existing state of scientific knowledge.

153. See, e.g., *Ulrich v. Kasco Abrasives Co.*, 532 S.W.2d 197, 200 (Ky. 1976); *Bilotta v. Kelley Co.*, 346 N.W.2d 616, 622 (Minn. 1984); *Freund v. Cellofilm Properties*, 432 A.2d 925, 930 (N.J. 1981); *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033, 1036 (Or. 1974); *Little v. PPG Indus.*, 579 P.2d 940, 946 (Wash. Ct. App. 1978), *aff'd*, 594 P.2d 911 (Wash. 1979).

154. In *Voss v. Black & Decker Manufacturing Co.*, 450 N.E.2d 204 (N.Y. 1983), the New York Court of Appeals indicated that it was not error for the trial court to refuse to allow into evidence, on the issue of notice, other complaints filed against the manufacturer, in part because in a strict products liability action, "the manufacturer's knowledge, actual or constructive, is not in issue." *Voss*, 450 N.E.2d at 210; see also *Deans v. Allegheny Int'l (USA), Inc.*, 590 N.E.2d 825, 827 (Ohio Ct. App. 1990) (since the proper focus in a products liability case is on the product and nature of the defect, not on the conduct of the manufacturer, knowledge that other rotary lawnmowers had been associated with accidents "is simply irrelevant").

155. See *supra* Part III.A.

156. See *Rye v. Black & Decker Mfg. Co.*, 889 F.2d 100, 103-04 (6th Cir. 1989) (admission of kickback potential of circular saw eliminated relevance of other accidents to prove notice of this potential).

157. 1 STRONG, *supra* note 2, § 200 (4th ed. 1992); see also *Julander v. Ford Motor Co.*, 488 F.2d 839, 846 (10th Cir. 1973).

*E. Proving that the Manufacturer Knew of the Use to Which the Product Was Put at the Time of the Accident*¹⁵⁸

Questions of the foreseeability of use generally relate to whether a particular use was "reasonably" foreseeable.¹⁵⁹ Even if there is abnormal use or misuse of a product, a plaintiff is generally not barred from recovery as long as the abnormal use or misuse is reasonably foreseeable.¹⁶⁰ Where there is abnormal use or misuse which is *not* reasonably foreseeable, however, plaintiff normally will be barred from recovery. Accordingly, whether a defendant should have known (i.e., should have reasonably foreseen) the use of a product can be critical in the determination of liability.

Though one may argue that prior knowledge through a claim or an accident is evidence of reasonable foreseeability, this is not necessarily the case. Even if there is proof that a bizarre accident happened once, this does not mean that the defendant should reasonably expect that it will happen again.

Additionally, the fact that a *claim* is made of a particular type of accident or use does not necessarily mean that it did occur in that manner, and it may even be that it physically could not have occurred in that manner.¹⁶¹ If an accident or use which is alleged in a prior claim did not or could not have occurred in the manner alleged, it would not give the defendant reason to expect a subsequent accident of this type. For a prior accident or claim to constitute notice of the foreseeability of use, of course, one must assume the truth of the prior event which allegedly provides notice. Such an assumption of truth, however, is exactly what the hearsay rule was meant to preclude.

Further, the date when the defendant became aware of another accident may eliminate any possibility that the other accident could provide relevant notice of foreseeability of use for the matter under review.¹⁶² Regardless of the date of the

158. This proposition is similar to the proposition *supra* in Part III.D. However, it also deals with the issue of foreseeability of use of the product.

159. See, e.g., *Higgins v. E.I. du Pont de Nemours & Co.*, 863 F.2d 1162, 1167-68 (4th Cir. 1988) (Maryland law); *McMurray v. Deere & Co.*, 858 F.2d 1436, 1442 (10th Cir. 1988) (Oklahoma law); *Ferguson v. F.R. Winkler GMBH & Co. KG*, 79 F.3d 1221, 1224-25 (D.C. Cir. 1996) (District of Columbia law); *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 452 n.9, 458 (Cal. 1978); *Talley v. City Tank Corp.*, 279 S.E.2d 264, 271 (Ga. Ct. App. 1981); *Varilek v. Mitchell Eng'g Co.*, 558 N.E.2d 365, 377 (Ill. App. Ct. 1990); *Hughes v. Magic Chef, Inc.*, 288 N.W.2d 542, 547-48 (Iowa 1980); *Reilly v. Dynamic Exploration, Inc.*, 571 So.2d 140, 144 (La. 1990); *Byrnes v. Economic Mach. Co.*, 200 N.W.2d 104, 108 (Mich. Ct. App. 1972); *Ford Motor Co. v. Matthews*, 291 So.2d 169, 174 (Miss. 1974); *Beatty v. Schramm, Inc.*, 458 A.2d 127, 129 (N.J. Super. Ct. App. Div. 1983); *Treadway v. Uniroyal Tire Co.*, 766 P.2d 938, 940-41 (Okla. 1988); *Burch v. Sears, Roebuck & Co.*, 467 A.2d 615, 619 (Pa. Super. Ct. 1983); *Schuh v. Fox River Tractor Co.*, 218 N.W.2d 279, 286-87 (Wis. 1974).

160. See, e.g., *Higgins*, 863 F.2d at 1167-68; *Ferguson*, 79 F.3d at 1224-25; *Varilek*, 558 N.E.2d at 377; *Hughes*, 288 N.W.2d at 547-48; *Ford Motor Co.*, 291 So.2d at 174; *Treadway*, 766 P.2d at 940-41; *Burch*, 467 A.2d at 619.

161. The discussion *supra* in Part II.A regarding suspicious claims of brake failure and impossible claims of rotational kickback are good examples.

162. See *supra* note 157 and accompanying text.

other accident, it could not provide any notice of foreseeability of use if it is not known to the defendant until after the accident in question.

F. Serving as a Basis for the Testimony of Plaintiff's Expert

Under Federal Rule of Evidence 703 and related state rules, an expert may rely upon facts or data which are not admissible in evidence if these items are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."¹⁶³ This provision raises several questions. First, is information about other accidents of the "type reasonably relied upon by experts in the particular field in forming opinions" (and, if so, for what particular opinions and what kind of information)? Second, what is the "particular field" in issue when making this determination? And third, even if the expert can rely upon information about other accidents in forming his opinions, can the expert relate this information to the jury?

A determination of whether particular information is "of a type reasonably relied upon by experts in the particular field" is a factual determination which should be made by the court under Rule 104(a).¹⁶⁴ Some state courts, under applicable state rules of evidence, also have held that this question is a factual one for the trial judge.¹⁶⁵ The court in *In re Paoli Railroad Yard PCB Litigation*¹⁶⁶ (*Paoli II*) stated that in making a determination as to reasonable reliance, the trial judge "must conduct an independent evaluation into reasonableness" and can take into account the particular expert's opinion that experts reasonably rely upon that type of data, opinions of other experts as to its reliability, and other factors that the judge deems relevant.¹⁶⁷ One commentator has suggested that the court consider testimony by the experts themselves, literature in the field, and perhaps judicial notice, and has

163. FED. R. EVID. 703. If the facts or data are otherwise admissible, then the expert, of course, could rely upon the information for the purpose(s) for which it has been admitted. *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1118 (5th Cir. 1991) (Clark, C.J., concurring). This subsection, therefore, only applies to an expert's use of otherwise inadmissible "other accident" evidence or use for an inadmissible purpose of "other accident" evidence which is admissible only for another purpose.

164. *In re Paoli R.R. Yard PCB Litig. (Paoli II)*, 35 F.3d 717, 748 (3d Cir. 1994). The court in *Paoli II* reversed the prior holdings of the Third Circuit on this issue, finding that the gatekeeping role for the trial judge mandated by *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), as to expert testimony requires that the factual determination of "reasonable reliance" be made by the court, not the expert. Before *Daubert*, the Third Circuit had stated that in making a factual inquiry as to what data experts in the field find reliable, the proper inquiry is "not what the court deems reliable, but what experts in the relevant discipline deem it to be." *DeLuca v. Merrell Dow Pharms.*, 911 F.2d 941, 952 (3d Cir. 1990). The court in *DeLuca* also had stated that "if an expert avers that his testimony is based on data experts in the field rely upon, then Rule 703's requirements are generally satisfied." *Id. Daubert* and *Paoli II* clearly represent the preferable view. See also Margaret A. Berger, *Evidentiary Framework*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, 103, 103-12 (Federal Judicial Ctr. ed., 1994).

165. See, e.g., *McLellan v. Morrison*, 434 A.2d 28, 30 (Me. 1981); *Schaeffer v. General Motors Corp.*, 360 N.E.2d 1062, 1067 (Mass. 1977); *Ryan v. KDI Sylvan Pools*, 579 A.2d 1241, 1247 (N.J. 1990); *Spencer v. Commonwealth*, 393 S.E.2d 609, 621 (Va. 1990); *Smith v. Sturm, Ruger & Co.*, 695 P.2d 600, 606-07 (Wash. Ct. App. 1985).

166. 35 F.3d 717 (3d Cir. 1994).

167. *Id.* at 748.

stated that "to allow the experts themselves to pass upon the reasonableness of their own practice would . . . be atypical and inconsistent with the judge's role under [Federal] Rule [of Evidence] 104(a)."¹⁶⁸

An important factor in assessing the reasonableness of an expert's reliance upon "other accident" evidence is the purpose for which the expert is relying upon the other accident(s). For an expert to state merely that his opinion is supported by the existence of ten other similar accidents reveals nothing (besides the existence of the other accidents) and is not helpful to the jury. The issue is *why* and *how* the other accidents support the opinion — in other words, the purpose for which the expert is seeking to rely upon those accidents. If that purpose is contrary to the existing law of the jurisdiction, then the reliance should be found to be unreasonable as a matter of law. For example, in a jurisdiction which holds that the mere happening of a prior accident with a product is not evidence that the product is defective,¹⁶⁹ an expert who relies upon a prior accident as evidence of a defect should not be permitted to rely upon it for that purpose because doing so would be contrary to law.¹⁷⁰ Likewise, if the expert relies upon prior accidents to show the extent of the risk in a risk/utility balancing equation but the prior accidents are not shown to be substantially similar,¹⁷¹ the expert could not reasonably rely upon the other accidents for this purpose. Further, if the expert attempts to rely upon other accidents for a purpose not in issue — such as the defendant's knowledge that an accident could occur as it did¹⁷² — such reliance would be irrelevant to the case and therefore improper insofar as the case is concerned.¹⁷³

168. 1 STRONG, *supra* note 2, § 15 n.11. This position has been supported in a case dealing with expert testimony on behalf of a defendant concerning the paucity of other similar accidents. *See* Ryan v. KDI Sylvan Pools, 579 A.2d 1241, 1247 (N.J. 1990).

169. *See supra* Part III.A.

170. In *Melton v. Deere & Co.*, 887 F.2d 1241 (5th Cir. 1989), the trial court was upheld in precluding plaintiff's expert from expressing an opinion that the combine in question was unreasonably dangerous based upon a risk/utility theory of strict liability when the applicable law of Mississippi was held to use a consumer expectation, rather than risk/utility test. (The Mississippi Supreme Court later disagreed with the federal court, however, and held that Mississippi does, in fact, follow a risk/utility test. *See* Sperry-New Holland v. Prestage, 617 So. 2d 248 (Miss. 1993).) *See also* CAL. EVID. CODE § 801 (West 1995) (permitting an expert to base his opinion upon material "whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, *unless an expert is precluded by law from using such matter as a basis for his opinion*" (emphasis added)). In *Spencer v. G.A. MacDonald Constr. Co.*, 134 Cal. Rptr. 78 (Ct. App. 1976), an expert was held properly barred from basing his opinion upon safety orders in view of a provision of the California Labor Code which prevented such orders from being evidential other than in proceedings against employers. The California Law Revision Commission comment to section 801 of the California Evidence Code indicates that the intent of the italicized phrase, *supra*, is that "an expert may not base his opinion upon any matter that is declared by the constitutional, statutory, or decisional law of the State to be an improper basis for an opinion." CAL. EVID. CODE § 801 cmt. (West 1995).

171. *See supra* note 134 and accompanying text.

172. *See supra* Part III.D.

173. The court can resolve the issue of the purpose for which the expert seeks to utilize the "other accident" evidence at a hearing out of the presence of the jury, pursuant to Federal Rule 104 or its state counterpart.

Permitting an expert to rely upon otherwise inadmissible evidence in forming opinions under Federal Rule of Evidence 703 does not give the expert carte blanche to use evidence in an improper manner. If the courts or statutes have provided that certain evidence cannot be used for a particular purpose, an expert cannot be permitted to contravene that policy.

Upon what type of information might an expert reasonably rely in forming opinions? This certainly would include particular types of hearsay, such as a patient's contemporaneous statements to a physician given for purposes of treatment¹⁷⁴ or a treating physician's reliance upon reports from a qualified laboratory. It also may include hearsay such as authoritative treatises and published studies of other scientists.¹⁷⁵ It should *not* include unverified accident reports, lawsuits, or claims by other plaintiffs, potential plaintiffs, or other biased observers,¹⁷⁶ nor should it include publications not shown to be authoritative.¹⁷⁷

174. In fact, statements given for purposes of medical diagnosis or treatment, though hearsay, are specifically permitted as an exception to the hearsay rule. See FED. R. EVID. 803(4). A physician's reliance upon patient statements given for purposes of treatment are generally justified as trustworthy in forming the basis for an opinion because of the patient's incentive to tell the truth due to a desire to recover from an illness or injury. Paul D. Rheingold, *The Basis of Medical Testimony*, 15 VAND. L. REV. 473, 495 (1962). Judge Weinstein has stated that when courts allow testimony relying upon patient statements, "they are based upon a personal history corroborated by medical records, a physical examination and medical tests." *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223, 1246 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987).

175. See Edward J. Imwinkelried, *The "Bases" of Expert Testimony: The Syllogistic Structure of Scientific Testimony*, 67 N.C. L. REV. 1 (1988). Professor Imwinkelried suggests a distinction between the expert's "major premise" — his general scientific principles and theories — and his "minor premise" — the case-specific information upon which he bases his opinions. For the major premise, Professor Imwinkelried believes that reliance upon hearsay source material such as the theories and studies of others "is an absolute necessity," since it would be absurd to require an accident reconstruction expert to repeat Newton's seventeenth century experiments to derive the laws of motion or a physicist testifying about the safety of a nuclear power plant to duplicate the works of Fermi or Oppenheimer. He would give great respect to the expert's choice of a major premise because the witness' area of expertise consists of mastery of the concepts, methodologies, principles and theories peculiar to the witness' scientific discipline. *Id.* at 8-10. With regard to the expert's selection of information as a minor premise, however, Imwinkelried states that "a radically different picture emerges. There is no absolute necessity to permit resort to hearsay sources, there is a much less compelling case for deference to the witness' selection, and by its very nature the information serving as the minor premise poses peculiar probative dangers at trial." *Id.* at 10.

176. See *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223 (E.D.N.Y. 1985) (Weinstein, C.J.) (rejecting expert opinions on toxic tort causation based upon hearsay checklists prepared by the litigants in connection with the litigation in question), *aff'd*, 818 F.2d 187 (2d Cir. 1987). In *Agent Orange*, Judge Weinstein points out that "[n]o case cited by plaintiffs has gone so far as to allow a doctor to rely on such self-serving laypersons' general affidavits and checklists prepared in gross for a complex litigation. The influence of glimmering gold at the end of the litigation is particularly evident in the affidavits signed by plaintiffs' counsel." *Id.* at 1247. Samples of the affidavits and checklists are contained at the end of the opinion. See *id.* at 1264-66.

177. See, e.g., *Ventura v. Winegardner*, 357 S.E.2d 764, 769 (W. Va. 1987) (error to permit vocational expert to base calculations of potential loss of earnings to injured tennis player upon earnings figures contained in *Tennis Week Magazine*); see also *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 597 (1993) (pointing to the requirement of a trial judge to assess the reliability of the basis for the expert's opinion).

The second question relates to the meaning of the phrase "particular field" in that portion of Federal Rule of Evidence 703 which permits an expert to rely upon otherwise inadmissible evidence as a basis for his opinion if that evidence is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."¹⁷⁸ It is submitted that the phrase "particular field" relates to the specific area of scientific endeavor about which the expert is testifying, *not* the "field" of a forensic expert. Support for this position is found in the Advisory Committee Notes to Rule 703, which give an example of what a physician, in his own practice, would rely upon and state, in part, as follows:

If it be feared that enlargement of permissible data [upon which an expert may rely] may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data "be of a type reasonably relied upon by experts in the particular field." The language would not warrant admitting in evidence the opinion of an "accidentologist" as to the point of impact in an automobile collision based on statements of bystanders since this requirement is not satisfied.¹⁷⁹

One court, in discussing a state equivalent to Rule 703, properly has stated that in considering the reasonableness of an expert's reliance upon data, it is not enough to show that the expert relies upon such data "only in preparing for litigation; he must establish that experts would act upon . . . [this data] for purposes other than testifying in a lawsuit."¹⁸⁰ Do experts who design products, then, reasonably rely upon "other accident" evidence? If this question is meant to refer to detailed, verified investigations of particular accidents in order to understand accident scenarios and help with product improvement, the answer is "yes."¹⁸¹ If it is meant to refer to information contained in unverified accident reports submitted by

178. FED. R. EVID. 703.

179. FED. R. EVID. 703 advisory committee's note.

180. *State v. Rolls*, 389 A.2d 824, 830 (Me. 1978).

181. The Consumer Product Safety Commission, for example, has conducted In Depth Investigations (IDIs) of accidents with particular products under review. It also receives reports, through the National Electronic Injury Surveillance System (NEISS), from data collected in selected hospital emergency rooms throughout the nation concerning particular accidental injuries. The reports received through NEISS are rather sketchy accounts, based frequently upon information received from the injured party, who is not an unbiased witness. When an IDI is conducted, however, there is an attempt to obtain more detailed information. Sometimes an IDI involves little more than a telephone call. See *Oberg v. Honda Motor Co.*, 851 P.2d 1084, 1099-1101 (Or. 1993) (Peterson, J., dissenting) (containing discussion and testimony regarding NEISS and the IDI process); see also Edward J. Heiden, et al., *Utility of the U.S. Consumer Product Safety Commission's Injury Data System as a Basis for Product Hazard Assessment*, 5 J. PROD. LIAB. 295 (1982) (criticizing the quality of the data generated by NEISS). At other times, an IDI involves an expert interviewing the injured party, examining the product involved in the accident, examining the accident scene, and conducting additional investigation. A detailed IDI conducted by a true expert would be the type of "other accident" evidence upon which, together with other information, a product designer might rely.

interested parties or persons who did not see the accident, pleadings drafted by attorneys, or unreliable testimony, the answer is "no."

The third question which arises in this area is the following: Assuming that an expert is permitted to rely upon otherwise inadmissible "other accident" evidence in the formation of an opinion, can the expert relate information about these other accidents to the jury? Although there is a substantial dispute as to whether an expert may relate to the jury a hearsay or otherwise inadmissible basis of the expert's opinion,¹⁸² the answer clearly should be in the negative. If not, then the situation would be one where the expert is improperly "used as a conduit for the introduction of otherwise inadmissible evidence."¹⁸³

Without referring specifically to "other accident" evidence, several commentators have addressed the general issue of an expert relating to the jury evidence which is not independently admissible but which is found to be reasonably relied upon by the expert. In a series of thoughtful articles, Professor Carlson argues that while an expert may be allowed the use of unadmitted hearsay information to form and propound expert opinions, that information would generally be inappropriate to be related to the jury.¹⁸⁴ He states:

[A]n expert whose opinion required extrinsic data may identify and briefly describe the supporting out-of-court document that gave rise to his conclusions. To go further and allow the admission of an unauthenticated writing into evidence or to permit the testifying expert to quote extensively from that writing violates accepted hearsay norms. Furthermore, in a criminal case, when a prosecutor directs an expert called by the state to read from an underlying report prepared by another person, the defendant's constitutional right to confront the

182. See Berger, *supra* note 164, at 105. Professor Berger has correctly framed the dispute about an expert's relating hearsay testimony as being "over whether [Federal] Rule 703 [of Evidence] authorizes experts to testify on direct to the hearsay basis for their conclusions or whether the basis of an expert's opinion may only be brought out on the cross-examiner's option pursuant to Rule 705." *Id.* Even if an expert is not permitted to present to the jury on direct testimony the particular hearsay (or other inadmissible evidence) upon which the expert is relying, an adversary should be given the right to bring out this material on cross-examination, if desired. As Professor Carlson has pointed out, such a procedure is similar to Federal Rule 612, which permits cross-examination as to a writing which a witness uses to refresh his recollection while testifying — and introduction into evidence by the cross-examiner of those portions of the writing relating to the testimony — but does not permit the proponent of the witness to admit the writing into evidence on direct examination. Ronald L. Carlson, *Collision Course in Expert Testimony: Limitations on Affirmative Introduction of Underlying Data*, 36 U. FLA. L. REV. 234, 247 (1984) [hereinafter Carlson, *Collision Course in Expert Testimony*].

183. Department of Corrections v. Williams, 549 So. 2d 1071, 1072 (Fla. Dist. Ct. App. 1989) (the court specifically rejected such use; while, in formulating his opinion, a defense expert was permitted to rely upon an affidavit of another inmate who could not be located at time of trial, the expert could not read the contents of the affidavit to the jury, since the affidavit was hearsay and inadmissible).

184. See Carlson, *Collision Course in Expert Testimony*, *supra* note 182; Ronald L. Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577 (1986) [hereinafter Carlson, *Modern Expert Testimony*]; Ronald L. Carlson, *Experts as Hearsay Conduits: Confrontation Abuses in Opinion Testimony*, 76 MINN. L. REV. 859 (1992) [hereinafter Carlson, *Experts as Hearsay Conduits*]; Ronald L. Carlson, *In Defense of a Constitutional Theory of Experts*, 87 NW. U. L. REV. 1182 (1993).

adverse witness is abridged. That the trial witness relied on the extrinsic report makes little difference. The outside report remains hearsay and is not admissible in evidence unless the proponent lays a proper foundation. While hearsay and confrontation concerns would seem minimal when an expert simply identifies a background document as a basis for his opinion, reporting fully to the jury from the conclusions of nontestifying experts is improper.¹⁸⁵

Professor Carlson also expresses concern about the unfair prejudice and jury confusion which can result from permitting the jury to hear the otherwise inadmissible evidence.¹⁸⁶ His quotation of a commentator responding to a proposal to change the Michigan rule to mirror Federal Rule 703 is particularly relevant as to the problems which can arise from the introduction, through an expert, of the substance of otherwise inadmissible evidence:

The hearsay exceptions provide a large gap through which a proponent of certain evidence may steer the juggernaut of advocacy. Suppose that certain evidence is utterly inadmissible under any hearsay exception, yet the proponent needs the evidence in the record. One may merely hire an expert who will assert that such as he or she reasonably relies on the data and presto! the inadmissible becomes admissible in Federal court.¹⁸⁷

Professor Imwinkelried agrees with Professor Carlson and, in discussing his distinction between the expert's major premise and his minor, case-specific

185. Carlson, *Modern Expert Testimony*, *supra* note 184, at 584. The reference by Professor Carlson to permitting the expert to "identify and briefly describe the supporting out-of-court document that gave rise to his conclusions" could lead to serious problems of unfair prejudice if the reference is interpreted to permit an expert to relate to the jury words to the effect that "I relied upon the manufacturer's list of [or answers to interrogatories indicating] twenty other accidents involving hand injuries with this model." However, it is not believed that the reference is intended so broadly, and Professor Carlson's analysis is entirely consistent with rejecting this type of testimony.

186. *Id.* at 589. Professor Carlson suggests a revision to Federal Rule 703 to add a new section (b) incorporating the following concept:

In criminal cases, and generally in civil cases, underlying expert data must be independently admissible in order to be received in evidence. An expert's reliance on unadmitted data does not mandate introduction of the data, where the sole reason for introduction is that it formed a basis for the expert's opinion. When good cause is shown in civil cases and the underlying information is particularly trustworthy, the court may admit the data under this rule to illustrate the basis for the expert's opinion.

Id. at 586. In 1990, Minnesota amended its Evidence Rule 703 to add the following:

(b) Underlying expert data must be independently admissible in order to be received upon direct examination; provided that when good cause is shown in civil cases and the underlying data is particularly trustworthy, the court may admit the data under this rule for the limited purpose of showing the basis for the expert's opinion. Nothing in this rule restricts admissibility of underlying expert data when inquired into on cross-examination.

MINN. R. EVID. 703; see Carlson, *Experts as Hearsay Conduits*, *supra* note 184, at 869.

187. Michael D. Wade, *Counterpoint, Should Michigan Rule of Evidence 703 Be Revised?*, 70 MICH. B.J. 572, 575 (1991), as quoted in Carlson, *Experts as Hearsay Conduits*, *supra* note 184, at 867.

premise,¹⁸⁸ he expresses concern about the jury's misuse of otherwise inadmissible case-specific hearsay information related by an expert.¹⁸⁹ A different view is taken by Professor Rice, however.¹⁹⁰ His feeling is that the value of the expert's conclusion is dependent upon the underlying premise and that the jury should be advised of the underlying premise, though it may be hearsay.¹⁹¹ He concludes as follows:

With the formal recognition of the expert's right to rely on otherwise inadmissible evidence . . . the practice is altering the players' roles in litigation. If we are comfortable both with the expert's assumption of the role of superfactfinder and thirteenth juror and with the diminished role that necessarily follows for the judge or jury, we openly should acknowledge and embrace this expanded role. If we are not, we should give up the severability fiction as a remnant of the past and establish a hearsay exception for the introduction of the bases of experts' opinions that sets forth meaningful standards for ensuring reliability.¹⁹²

Some of us, however, are not comfortable with an expert's "assumption of the role of superfactfinder and thirteenth juror"¹⁹³ nor with the proposed "diminished role" for the court,¹⁹⁴ nor are we in favor of creating a hearsay exception which would permit an expert to act as a conduit for whatever hearsay or otherwise inadmissible evidence is sought to be placed before the jury.¹⁹⁵ This is particularly true with regard to the question of an expert relating to the jury information about the occurrence of other accidents. The stakes are too high, the probative value too low, and the likelihood of unfair prejudice too great.¹⁹⁶

G. Affecting the Credibility of a Defense Expert

A number of cases have dealt with attempts to affect the credibility of defense experts through the use of other accidents during cross-examination. Some courts

188. See *supra* note 175.

189. Imwinkelried, *supra* note 175, at 26.

190. See Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson*, 40 VAND. L. REV. 583 (1987).

191. *Id.* at 584.

192. *Id.* at 596.

193. *Id.*

194. *Id.*

195. One commentator has taken the position that Professor Carlson does not go far enough, and that there should be a tightening of the bases upon which an expert may rely. David L. Faigman, *Commentary: A Response to Professor Carlson, Struggling to Stop the Flood of Unreliable Expert Testimony*, 76 MINN. L. REV. 877, 889 (1992); see also *Schuchman v. Stackable*, 555 N.E.2d 1012, 1036-39 (Ill. App. Ct. 1990) (discussing the positions of Professors Carlson, Imwinkelried and Rice).

196. See also *In re Air Crash Disaster at New Orleans*, 795 F.2d 1230 (5th Cir. 1986). There, the court referred to the fact that "the professional expert is now commonplace," criticized the "let it all in" philosophy and the tendency of the trial courts to receive all types of expert testimony with the hope that the jury will give it "the weight that it deserves," and suggested that the trial judges "take hold of expert testimony." *Id.* at 1233-34.

have permitted such questioning and others have not. In *Hale v. Firestone Tire & Rubber Co.*¹⁹⁷ (*Hale II*), for instance, plaintiff was injured by an exploding wheel rim and the defense expert testified at length to his opinion that the rim was safely designed and that he had analyzed the design and tested it extensively. Following this testimony, plaintiff's counsel cross-examined the expert about dissimilar accidents, some of which were unknown to the expert. Plaintiff argued on appeal that the evidence of the other accidents was proper to question the qualifications of the witness, disprove his theories, and impeach his testimony. The court agreed.¹⁹⁸ In doing so, the court stated that "[t]his evidence was proper for impeachment purposes under the facts of this case where this expert delivered vast and comprehensive testimony as to the safety of the RH5 rim."¹⁹⁹

In *Wheeler v. John Deere Co.*,²⁰⁰ the defense expert testified that there were no safety hazards surrounding the vertical auger cleanout door in a combine manufactured by the defendant.²⁰¹ The court held that while evidence of other accidents is admissible to impeach expert testimony that a product was designed without safety hazards, the plaintiff must first show that those accidents are "substantially similar to the accident presently at issue."²⁰² Plaintiff's failure in *Wheeler* to show substantial similarity as to certain of the other accidents resulted in a reversal.²⁰³

In *Drabik v. Stanley-Bostitch, Inc.*,²⁰⁴ the trial judge permitted plaintiff's counsel to cross-examine the defense expert as to other pneumatic nailer accidents about which there was insufficient proof of similarity. The Eighth Circuit reversed plaintiff's verdict, pointing out that the defense expert was "testifying as to his opinions, and any qualified expert must be entitled to do that without having to rebut extraneous evidence of dissimilar accidents."²⁰⁵ The defense expert in *Drabik*, had testified that the nailer in question was "not defective . . . [and was] suitable and proper . . . [and] reasonably safe" and, in response to a leading question from plaintiff's attorney during cross-examination, had agreed that the nailer was "generally safe."²⁰⁶ *Hale II*, also an Eighth Circuit opinion, was distinguished and limited by the court because the expert's testimony in *Drabik* was found not to rise to the "vast and comprehensive" level necessary to permit nonsimilar accident evidence for impeachment purposes, and also because the "other accident" evidence in *Hale II* "was a minute portion of the cross-examination," whereas in *Drabik*, it "formed the crux of the cross-examination."²⁰⁷ As the court in *Drabik* continued,

197. 820 F.2d 928 (8th Cir. 1987).

198. *Id.* at 934.

199. *Id.* at 935. See the criticism of the *Hale II* decision in Note, *supra* note 2, at 553-54.

200. 862 F.2d 1404 (10th Cir. 1988).

201. *Id.* at 1409.

202. *Id.*

203. *Id.*; see also *Peterson v. Auto Wash Mfg. & Supply Co.*, 676 F.2d 949, 953 (8th Cir. 1982) (upholding the refusal to permit cross-examination of a party about a subsequent dissimilar accident to impeach testimony that "there had never been a problem" with instructions at the car wash in question).

204. 997 F.2d 496 (8th Cir. 1993). See also discussion *supra* Part II.C.

205. *Drabik*, 997 F.2d at 509.

206. *Id.*

207. *Id.*

To hold that an expert who simply offers his opinion that a product is "generally safe" opens the door to all other accident evidence would create an exception which would swallow the general rule. An expert would not be able to render an opinion without having to address a litany of other accidents that may or may not be even remotely like the accident at issue. This simply places too big a burden on defendants. The general rule of limiting the admission of other accident evidence to those events which were substantially similar ensures that the focus of the trial stays on the specific type of accident forming the basis of the case.²⁰⁸

Should evidence of other accidents be admissible to affect the credibility of a defense expert in a product liability case? This depends upon what the expert has said and the nature of the proof of these other accidents. It also may depend, in part, upon whether the expert's statements for which the other accidents are claimed to affect his credibility are made in the course of his direct examination or upon a leading question in cross-examination designed to open the door to questioning about other accidents.

If the expert states in direct examination, as he apparently did in *Wheeler*, that there were "no safety hazards," and if he persists in this contention, then evidence of other accidents might be warranted to contradict this testimony.²⁰⁹ Likewise, if an expert testifies that an accident cannot possibly occur in a certain way, it would seem reasonable for properly verified and competent testimony to be presented that it has, in fact, occurred in that manner. Critical in the presentation of such evidence to affect the credibility of the expert, however, is that the evidence be verified and competent and, if it is contested, that the opponent of the "other accident" evidence have sufficient opportunity for cross-examination and presentation of proof to meet the contentions and allegations of similarity.²¹⁰ Otherwise, the potential exists that hearsay, unreliable,²¹¹ and unfairly prejudicial evidence will be presented to the jury and will affect the outcome of the case.

If, however, the expert expresses the opinion that the product is properly designed, is reasonably safe, or is not defective, as in *Hale II* and *Drabik*, then "other accident" evidence should not be permitted in the guise of attempting to

208. *Id.*

209. It is difficult to conceive that the expert in *Wheeler* would deny, upon questioning, that an accident could occur, as it apparently did to plaintiff, if a worker placed his arm through the cleanout door of the defendant's combine and into the auger, and if someone thereafter engaged the auger. It also would be unusual for an expert to contend that there were *no* safety hazards with a product, since virtually any product has potential safety hazards. The exact nature of the questions and of the answers given by the expert in *Wheeler* as to the absence of safety hazards is not set forth in the opinion of the court.

210. Where there is an attempt to impeach a defense expert by the use of evidence of other accidents, the issue of the propriety of such evidence should be raised initially outside the presence of the jury, and the court should make a finding of admissibility pursuant to FED. R. EVID. 104(c).

211. See, e.g., the examples of false claims of automobile brake failure and of chain saw rotational kickback discussed *supra* in Part II.A.

affect the credibility of the witness. Indeed, the fact that other accidents may have occurred — even other similar accidents — does not necessarily contradict this testimony. In evaluating any claim that evidence of other accidents is necessary to affect the credibility of a defense expert, the court must consider what has been said by the expert and whether the other accidents (assuming they can be established by competent proof to be sufficiently similar) really do contradict the testimony.²¹² If they do, the court can then weigh the probative value of the other accidents against the dangers of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or waste of time under Federal Rule of Evidence 403 or the applicable state rule.

H. Serving as a Basis of a Claim for Punitive Damages

Where punitive damages are permitted in a product liability action,²¹³ "other accident" evidence has been used to support a claim for punitive damages. In this area, competent evidence of other accidents, satisfying the necessary foundational requirements, is proper as one element to be considered by the trier of fact, along with other necessary evidence.

In general, punitive damages may be awarded for "conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."²¹⁴ Dean Prosser has used the terms "intentional and deliberate," having the character of "outrage," and "such a conscious and deliberate disregard of the

212. In *Johnson v. Ford Motor Co.*, 988 F.2d 573, 580 (5th Cir. 1993), for instance, the court held that dissimilar incidents were of "no value" in impeaching the testimony of defendant's expert that he was not aware of other instances in which a particular joint on a Ford vehicle "seized" and caused a loss of steering control. In *Julander v. Ford Motor Co.*, 488 F.2d 839 (10th Cir. 1973), plaintiffs alleged a defective design of the steering system of the Ford Bronco which caused the vehicle to "oversteer" at certain speeds due to the high center of gravity of the vehicle, the lack of independent front suspension, and a short wheel base. Plaintiffs called a Ford employee as an adverse witness, and asked him if he was aware of any "legal or written complaints by users of Broncos about steering problems." *Id.* at 845. After he replied that he was not, plaintiffs sought to introduce copies of seven complaints filed against Ford in various courts throughout the country alleging steering problems with the Bronco. These were admitted over Ford's objection, and on appeal, plaintiffs claimed, among other things, that the complaints constituted impeachment of the witness. *Id.* In reversing the decision of the district court, the court of appeals pointed out that the complaints did not impeach the testimony of the witness that he did not know of them, and stated that there was no evidence which disputed his testimony in this regard. *Id.* at 846. Although not discussed by the court in *Julander*, it further seems clear that it is improper to solicit introduction of otherwise inadmissible claims or lawsuits merely by asking an adverse witness a question such as: "Are you aware that there are 15 other claims against your company alleging the same problem as experienced by the plaintiff?"

213. The great majority of states permit punitive damages in a product liability action. However, a few do not. See, e.g., N.H. REV. STAT. ANN. § 507:16 (Supp. 1995) (punitive damages outlawed unless otherwise provided by statute); *Distinctive Printing & Packaging Co. v. Cox*, 443 N.W.2d 566, 574 (Neb. 1989); *Miller v. Kingsley*, 230 N.W.2d 472, 474 (Neb. 1975) ("It is a fundamental rule of law in this state that punitive, vindictive, or exemplary damages are not allowed."); *Barr v. Interbay Citizens Bank*, 635 P.2d 441, 444 (Wash. 1981) (with narrow exceptions made by the legislature, "punitive damages are contrary to public policy"), *modified*, 649 P.2d 827 (Wash. 1982).

214. RESTATEMENT (SECOND) OF TORTS § 908(2) (1977).

interests of others that the conduct may be called wilful or wanton."²¹⁵ Various state statutes dealing with punitive damages use similar terms.²¹⁶ The existence of other accidents, though, is neither sufficient to prove a defect,²¹⁷ nor does it provide the circumstances of "outrage" necessary for the award of punitive damages.²¹⁸ Where such evidence can be useful in the area of punitive damages is on the issue of notice or knowledge. In the punitive damages setting, however, "notice" and "knowledge" mean much more than knowledge that other accidents have occurred or that there are certain hazards connected with use of the product.²¹⁹

Professors Ghiardi and Kircher make clear that the type of notice or knowledge required in a product liability punitive damages claim is knowledge both of a defect and of the danger of substantial harm from the defect. As they state, "[a] defendant who is unaware of a product's defect can hardly 'consciously' or 'recklessly'

215. KEETON, *supra* note 92, § 2, at 9-10.

216. See, e.g., CAL. CIV. CODE § 3294 (West Supp. 1996) ("oppression, fraud or malice"; "oppression" is defined as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights"); COLO. REV. STAT. § 13-21-102 (1987) ("fraud, malice, or willful and wanton conduct"); CONN. GEN. STAT. ANN. § 52-240b (West 1991) ("reckless disregard for the safety of product users, consumers or others who were injured by the product"); GA. CODE ANN. § 51-12-5.1(b) (1990) ("willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences"); IOWA CODE ANN. § 668A.1 (West 1987) ("willful and wanton disregard for the rights or safety of another"); KAN. STAT. ANN. § 60-3701(c) (West 1994) ("willful conduct, wanton conduct, fraud or malice"); MINN. STAT. ANN. § 549.20 (West Supp. 1996) ("deliberate disregard for the rights or safety of others"); MONT. CODE ANN. § 27-1-221 (1993) ("actual fraud or actual malice"); NEV. REV. STAT. § 42.005 (1991) ("oppression, fraud or malice, express or implied"); N.J. STAT. ANN. § 2A:15-5.12 (West Supp. 1996) ("actual malice" or an act or omission "accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions"); OHIO REV. CODE ANN. § 2307.80(A) (Anderson 1995) ("misconduct . . . that manifested a flagrant disregard of the safety of persons who might be harmed by the product in question"); 23 OKLA. STAT. § 9.1 (Supp. 1996) (three graduated categories for punitive damages: clear and convincing evidence of "reckless disregard for the rights of others"; clear and convincing evidence of an act done "intentionally and with malice towards others"; and evidence beyond a reasonable doubt of an act done "intentionally and with malice towards others" where the defendant "engaged in conduct life-threatening to humans"); OR. REV. STAT. § 18.537 (Supp. 1996) ("malice" or "a reckless and outrageous indifference to a highly unreasonable risk of harm" and action "with a conscious indifference to the health, safety and welfare of others"); S.D. CODIFIED LAWS § 21-3-2 (Michie 1987) ("oppression, fraud, or malice, actual or presumed"); UTAH CODE ANN. § 78-18-1 (1992) ("willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others").

217. See *supra* Part III.A.

218. Very substantial additional evidence should be required for this purpose. See, e.g., *infra* note 219.

219. For an example of the type of additional evidence which has been presented to show knowledge in a punitive damages context, see *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Ct. App. 1981). *Grimshaw* arose from the rupture of a Ford Pinto fuel tank in a rear end collision, resulting in fatal burns to the driver and severe burn injuries to the passenger. Evidence was presented that Ford proceeded with production of the Pinto with knowledge that the fuel tank was improperly located and insufficiently protected, and after rejecting recommendations from its engineers that the condition be corrected. The court referred to management's knowledge that the condition could be corrected for a cost of \$4 to \$8 per car and to an inference that the defendant "decided to defer corrective measures to save money and enhance profits." *Id.* at 361-62, 369.

disregard any other party's rights."²²⁰ They further point out that "in every award of punitive damages [in a product liability action], the defendant manufacturer was aware of the existing defect and was aware of the serious danger of substantial harm posed by such defect."²²¹ In *Lewy v. Remington Arms Co.*,²²² the court declared that "notice is important in establishing a submissible case for punitive damages."²²³ And in *Soden v. Freightliner Corp.*,²²⁴ where evidence of other accidents was admitted on the issue of knowledge, the court made clear that "Freightliner's knowledge of the defective design of its fuel system . . . was a required element in the . . . claim for exemplary damages."²²⁵

There is little doubt that evidence of other accidents, particularly those involving serious injuries, can have a powerful — and sometimes unfair — impact upon the jury and be instrumental in the award of punitive damages.²²⁶ Accordingly, great care must be taken in its admission for that purpose. The court in *Soden* permitted evidence of complaints to the defendant of other postcollision fuel fires, but gave strong limiting instructions to the jury. These instructions included stating to the jury that the other complaints were not being offered to prove the truth of the matters therein but only to show notice of allegations or claims of defective design; that the notice constituted "unsworn hearsay allegations of persons seeking to recover money damages from the defendant"; and that "[t]he complaints are not proof of the matters alleged."²²⁷ The limiting instructions undoubtedly were helpful, but while the jury in *Soden* did not award punitive damages, it did award \$885,300 in compensatory damages. The extent to which the compensatory award may have been increased — or even caused — by the admission of the "other accident" evidence is unknown.

Finally, when the sole purpose for the admission of evidence of other accidents is to show notice or knowledge for purposes of a punitive damages claim, it is suggested that the issue of punitive damages be bifurcated.²²⁸ In this way, the

220. JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE § 6.21 (Supp. 1991).

221. *Id.*

222. 836 F.2d 1104 (8th Cir. 1988).

223. *Id.* at 1108.

224. 714 F.2d 498 (5th Cir. 1983).

225. *Id.* at 508; see also *Ramos v. Liberty Mut. Ins. Co.*, 615 F.2d 334, 338-39 (5th Cir. 1980).

226. See, for example, the awards in *General Motors Corp. v. Moseley*, 447 S.E.2d 302 (Ga. Ct. App. 1994) and *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496 (8th Cir. 1993), which were overturned due to the improper admission of "other accident" evidence. See also *supra* note 2 and accompanying text.

227. *Soden*, 714 F.2d at 507 n.12. The court also indicated that "the weaknesses otherwise inherent in allegations as a basis for notice were mitigated by several factors," including that the defendant did not contest either the occurrence of the other accidents or that they involved post-crash fuel fires, did not seek to dispute similarity, and did not raise at trial a claim that the evidence was unduly prejudicial under Rule 403 of the Federal Rules of Evidence. *Id.* at 508-09.

228. For an itemization of legislative activity concerning bifurcation of punitive damages, see *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1619-20 (1996) (Ginsburg, J., dissenting). Even in the absence of statutory authority, courts generally have the power to bifurcate claims "to avoid prejudice" or for other reasons. See FED. R. CIV. P. 42(b) and related state rules in this regard. Bifurcation of

likelihood of unfair prejudice which may affect the jury's decision in the underlying claim can be avoided.

IV. Conclusion

While the admission of "other accident" evidence in product liability litigation can be critical to the outcome of a case, the proper role of such evidence is in much dispute.²²⁹ This article has attempted to explore the foundational bases for the admission of this evidence, to consider the merits of the principal arguments raised for admission, and to analyze why, and under what circumstances, admission is warranted.

From a review of the decisions, it is apparent that a considerable number of courts have ignored important issues necessary to reach a proper determination of the question of admissibility. The failure to consider these issues often has led to unjust results. With an appropriate foundation, "other accident" evidence does have a legitimate place in product liability litigation. This place, however, is considerably narrower and accompanied by more restrictions than many courts have found.

punitive damages claims is desirable for a number of reasons, including not just the avoiding of prejudice, but also avoiding the necessity to produce potentially lengthy testimony and exhibits which will be unneeded (in those states which require a compensatory damages verdict in order to permit punitive damages to be awarded) unless the plaintiff is able to recover compensatory damages.

229. Professors Wright and Graham have concluded that "[t]he cases are in a state of hopeless disorder" and have correctly written that "often the appellate courts fail to take into account the distinctions necessary for a proper evaluation of the relevance of evidence of other incidents through a failure to carefully consider the purposes for which the evidence is offered." 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5170 (1978).

